

No. 16357

United States
Court of Appeals
for the Ninth Circuit

JOHN N. SEAVER, JR.,

Appellant.

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 246)

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Appeal from the United States District Court
for the District of Oregon.

No. 16357

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 8695

JOHN N. SEAVER, JR.,

Plaintiff,

vs.

UNITED STATES PLYWOOD CORPORATION,

Defendant.

AMENDED COMPLAINT

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Since October 2, 1942, plaintiff and his assignors have been and plaintiff now is the owner of the following described real property to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9 West, of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of

Section 6, Township 19 South, Range 9 West of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West of the Willamette Meridian, all in Lane County, Oregon.

together with all trees and timber thereon, except that old growth and second growth fir and hemlock which was merchantable on May 4, 1942.

III.

Subsequent to June 24, 1950, and prior to August 10, 1955, Siuslaw Forest Products, Inc., a Washington corporation and defendant intentionally trespassed upon said land and wilfully cut and removed therefrom over 5,000,000 feet of old growth and second growth fir and hemlock trees and timber which was not merchantable on May 4, 1942, and other species of trees and timber thereon to plaintiff's damage in the sum of \$100,000.00.

IV.

G. E. Tucker and Marilla W. Tucker, husband and wife and S. W. Tucker and Dorothy S. Tucker, husband and wife, who owned the property described in Paragraph II from October 2, 1942, to June 24, 1952, when plaintiff acquired it, have assigned their claim against Siuslaw Forest Products, Inc., and defendant to plaintiff herein.

V.

Defendant has assumed and agreed to pay all debts, claims and obligations of Siuslaw Forest Products, Inc.

Wherefore, plaintiff prays for a judgment against defendant for treble the amount of \$100,000.00 or \$300,000.00, together with its costs and disbursements herein incurred.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN,

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed November 23, 1956.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Defendant for answer to the amended complaint herein admits, denies and alleges as follows:

First Defense

The amended complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

A portion of the right of action set forth in the amended complaint did not accrue within six years next prior to the commencement of this action.

Third Defense

A portion of the right of action for treble damages set forth in the amended complaint did not accrue within three years next prior to the commencement of this action.

Fourth Defense

Defendant admits the allegations of Paragraph 1 and that plaintiff is the owner of the real property described in Paragraph 2 of the amended complaint; alleges that it is without knowledge or information sufficient to form a belief as to Paragraph 4 of the amended complaint; and denies each and every other allegation in said amended complaint except as hereinafter affirmatively alleged.

Fifth Defense

Plaintiff is estopped to maintain this action by reason of the following circumstances:

I.

Prior to May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife (hereinafter called "Warlicks"), were the owners of the lands described in plaintiff's amended complaint, together with the timber thereon. On or about May 4, 1942, the Warlicks entered into a certain "Timber Sales Agreement" with Siuslaw Forest Products, Inc., a corporation (hereinafter called "Siuslaw").

II.

By the terms of said agreement the Warlicks agreed to sell to Siuslaw "All of the merchantable

old growth and second growth fir and hemlock timber either standing or down and now growing or located" upon the lands described in plaintiff's complaint. Said agreement also provided as follows:

"It is expressly understood that the Vendee shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such additional time as may be reasonably necessary, not to exceed five years, to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

III.

Said Timber Sales Agreement also provided that the vendee of the timber should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land)."

IV.

Subsequent to the execution of said agreement, defendant acquired the rights of Siuslaw under said agreement and plaintiff, by mesne conveyances, acquired the title to the lands covered thereby and described in plaintiff's amended complaint.

V.

Subsequent to May 4, 1942, and prior to the expiration of twenty years from May 4, 1942, Siuslaw

and defendant engaged in the cutting and removal of the merchantable timber from the lands covered by the agreement. All timber cut and removed from said property by defendant and Siuslaw were so cut and removed by them in the belief that they were entitled to do so under said contract, and with the knowledge, consent and acquiescence of plaintiff and his predecessors in interest.

VI.

In reliance on the existence of its right to cut and remove said timber, on or about August 10, 1955, defendant entered into a certain logging contract with plaintiff covering a portion of the lands described in plaintiff's amended complaint. Said contract recited that defendant was the owner of the timber described therein and provided that plaintiff should log said timber for defendant at an agreed rate of compensation. Plaintiff executed said contract knowing that defendant believed in, asserted, and relied on the existence of its rights under the Timber Sales Agreement. Plaintiff entered the lands described in said logging contract, logged the timber therefrom and accepted defendant's payment for his services.

VII.

In further reliance on the existence of its rights under the Timber Sales Agreement, defendant at all times material herein paid all taxes and assessments on the timber located on said property. Defendant made all such payments at the request of and with the knowledge, acquiescence, and consent of plain-

tiff and in reliance on the existence of its rights under the Timber Sales Agreement, which reliance was known to plaintiff.

Wherefore defendant, having fully answered plaintiff's amended complaint, prays that the same be dismissed, that plaintiff take nothing thereby and that defendant have and recover from plaintiff its costs and disbursements herein.

/s/ M. B. STRAYER,

/s/ DONALD HUSBAND,

/s/ G. C. HAZARD, JR.,

Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed December 16, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above-entitled action came on regularly for a pretrial conference before the undersigned judge of the above-entitled court on Monday, April 21, 1958, at 10:00 a.m. Plaintiff appeared by and through James C. Dezendorf and Lewis Hoffman of his attorneys. Defendant appeared by and through Hugh L. Biggs and Donald Husband of its attorneys. No demand for a jury trial of any issue of fact having been made by either party, the action will be tried before the court without a jury. The following facts have been agreed to for the purpose of this action:

Agreed Facts

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife, were the owners of the following described real property, to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9 West, of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of Section 6, Township 19 South, Range 9 West, of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West, of the Willamette Meridian, all in Lane County, Oregon.

together with all trees and timber thereon.

III.

On the 4th day of May, 1942, said Warlicks entered into a timber sales agreement with Siuslaw Forest Products, Inc., by the terms of which the

Warlicks agreed, among other things, to sell to Siuslaw and Siuslaw agreed to purchase and remove "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located" upon the real property above described, which said agreement also provided as follows:

"It is expressly understood that the Vendee (Siuslaw) shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such
. not to exceed five years, additional time as may be reasonably necessary to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

That Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)."

IV.

On October 29, 1942, the Warlicks conveyed to G. E. Tucker and Marilla W. Tucker, husband and

wife, and S. W. Tucker and Dorothy S. Tucker, husband and wife, the real property described above, except for the timber upon the premises theretofore sold by grantors (Warlicks) under that certain contract recorded at Volume 232, page 615, Lane County, Oregon, deed records.

V.

On the 14th day of July, 1952, the Tuckers, referred to in paragraph IV, entered into a contract with the plaintiff, wherein the Tuckers agreed to sell and plaintiff agreed to buy all of the Tuckers' interest in the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, page 615, Lane County, Oregon, deed records. Subsequently, pursuant to the terms of the said contract, the Tuckers conveyed to plaintiff the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, page 615, Lane County, Oregon, deed records.

VI.

On the 1st day of May, 1953, defendant United States Plywood Corporation acquired all of the assets and assumed all of the liabilities of Siuslaw Forest Products, Inc., and thereafter caused Siuslaw to be dissolved.

VII.

On November 16, 1956, the Tuckers executed and delivered to plaintiff a document entitled "Assignment," wherein the Tuckers undertook to assign all

their right, title and interest in and to any and all claims they then had or in the past had had against Siuslaw Forest Products, Inc., and/or defendant arising from or in any way connected with the timber or timber rights located on the real property above described, or in any way connected therewith from the date the Tuckers acquired the right to possession of said real property and the timber thereon to the date that they sold it to plaintiff.

VIII.

Defendant paid certain taxes and assessments on the timber located on the real property above described.

IX.

In the year 1949, defendant's predecessor, Siuslaw Forest Products, Inc., commenced logging operations on the real property above described. Thereafter said logging operations were carried on from time to time by said Siuslaw Forest Products, Inc., and/or defendant until the year 1956. During the period between 1949 and 1956, defendant and its predecessor, Siuslaw Forest Products, Inc., cut and removed the following species and quantity of timber from the said real property:

Description	M Board Feet
Old growth Douglas fir.....	6,730
Second growth Douglas fir.....	4,156
Hemlock	591
Cedar	8
	<hr/>
	11,485

X.

Plaintiff and defendant entered into a certain logging contract dated August 10, 1955, pursuant to which plaintiff, as a logger for defendant, cut and removed 108 M board feet of the total timber described in paragraph IX above from portions of the real property above described and delivered the same to defendant. Some of the timber on the premises cut by plaintiff was not removed therefrom.

XI.

Plaintiff made no objection or remonstrance to defendant or its predecessor about the quantity, quality, size or species of the timber which they were cutting and removing from said premises until the spring of 1956.

Plaintiff's Contentions

I.

Subsequent to June 24, 1950, defendant and its predecessor intentionally trespassed upon the land involved and wilfully cut and removed therefrom (a) over five million feet of old growth and second growth fir and hemlock trees and timber (1) which was not merchantable on May 4, 1942, or (2) which had been abandoned, and in which they had relinquished their interest, and (b) other species of trees and timber thereon, of the value of over \$100,000, and that plaintiff is entitled to recover from defendant \$300,000 together with his costs and disbursements herein incurred.

II.

Under the May 4, 1942, contract Siuslaw and defendant, as its successor, was entitled to remove only the old growth and second growth fir and hemlock timber which was merchantable on May 4, 1942, and not that which may have become merchantable thereafter.

III.

The words "merchantable timber" contained in the May 4, 1942, contract are clear and unambiguous, and it has never been the law in Oregon that "merchantable timber" is that timber which has commercial value during the life or term of the contract so that extrinsic evidence may not be introduced to interpret the contract.

IV.

Plaintiff is entitled to recover treble damages for the removal subsequent to June 24, 1950, by defendant and its predecessor of 8,000 board feet of cedar timber not conveyed by the May 4, 1942, contract.

V.

If there was any merchantable timber left on the land involved on June 24, 1950 (which plaintiff denies), defendant's predecessor had abandoned or relinquished its interest therein prior to June 24, 1950.

VI.

Under the facts and circumstances in this action, estoppel is not available to defendant as a defense.

VII.

Plaintiff is not estopped by his conduct or by any

alleged consent from recovering all or any of the damages otherwise recoverable by him in this action.

VIII.

The proper statute of limitations involved in this action with respect to plaintiff's right to recover single, double or treble damages is six years, and the six year statute is applicable from the date of the filing of the complaint herein and not from the date of filing of the amended complaint.

IX.

A cause of action for trespass to lands and timber thereon is assignable, and plaintiff by the assignment involved acquired the right of action of his predecessors against defendant's predecessor and defendant is liable therefor.

X.

It is no defense to the claim herein for double or treble damages that defendant or its predecessor acted under a mistake of law in removing the timber based upon an erroneous construction of the May 4, 1942, contract.

XI.

None of the second growth fir and hemlock timber and only a portion of the old growth timber removed from the land involved by defendant and its predecessor in interest on or after June 24, 1950, was merchantable on May 4, 1942.

Defendant's Contentions

I.

All of the timber cut and removed by defendant and Siuslaw Forest Products, Inc., was merchantable on May 4, 1942.

II.

It was the intention of the parties to the contract of May 4, 1942, to sell and purchase all of the timber located on the real property described in the complaint which was or should become merchantable during the life of the contract, and, pursuant to the intention of the parties to the contract and consistent with their subsequent conduct, all of the timber removed by defendant or its predecessor, Siuslaw Forest Products, Inc., was conveyed to Siuslaw Forest Products, Inc.

III.

The provisions of the contract of May 4, 1942, are ambiguous with respect to the timber conveyed thereby and extrinsic evidence is admissible to show the intention of the parties and all the circumstances attending the transaction.

IV.

Although the cedar timber was not specifically mentioned in the contract of May 4, 1942, the volume and value thereof was so small as to be de minimis.

V.

Defendant denies it ever relinquished or abandoned any of its rights in or to any of the timber conveyed by the contract of May 4, 1942.

VI.

Plaintiff is estopped from asserting any claim for damages for timber removed from the premises after he became the owner of the land upon which it was growing because of his failure to make any objection to the cutting and removing of the timber although he had knowledge of the actions of the defendant and/or its predecessor in logging the same, and because of his acquiescence and participation in the cutting and removal of a portion of the timber.

VII.

Plaintiff did not acquire by assignment from his predecessors, the Tuckers, any rights which may be asserted against defendant in this action.

VIII.

Plaintiff is barred from maintaining an action for the recovery of the value of any timber removed from the premises more than six years prior to the filing of the amended complaint herein on the 23rd day of November, 1956.

IX.

In any event plaintiff is barred from maintaining an action for the recovery of treble damages for any timber removed more than three years prior to the filing of the amended complaint herein on the 23rd day of November, 1956.

X.

The timber referred to in paragraph IX of the Agreed Facts was removed by defendant and its

predecessor in good faith in the reasonable belief that they were entitled thereto under the terms of the contract dated May 4, 1942.

XI.

Plaintiff is not entitled to recover damages in any sum from defendant.

Issues of Fact

I.

How much of the fir and hemlock timber, if any, removed by defendant and its predecessor in interest within the limitations periods applicable to this action, was not merchantable within the meaning of the May 4, 1942, contract?

II.

Did defendant or its predecessor in interest abandon or relinquish their interest in any timber that was merchantable within the meaning of the May 4, 1942 contract, and if so, when?

III.

How much timber, if any, was removed by defendant or its predecessor within the limitations periods applicable to this action after it had been abandoned or their interest therein had been relinquished?

IV.

If defendant is liable to plaintiff for the removal of any timber, what was the value of each species of

timber for which it is liable at the time it was removed?

V.

If defendant is liable to plaintiff for the removal of any timber, was its conduct or that of its predecessor in interest such as to make defendant liable for double or treble damages?

Plaintiff's Contended Issues of Fact

I.

When did plaintiff first learn that under the May 4, 1942, contract defendant and its predecessor in interest were only entitled to remove that fir and hemlock timber which was merchantable on May 4, 1942?

II.

Did plaintiff in any way intentionally mislead defendant or its predecessor in interest after acquiring such knowledge?

III.

Did defendant or its predecessor in interest change its or their position in any way to its or their detriment in reliance upon any action or conduct of plaintiff which took place after the plaintiff first learned that defendant and its predecessor had taken timber from his land to which they were not entitled?

Defendant's Contended Issue of Fact

I.

Did plaintiff and his predecessors consent to the cutting and removal by defendant and its predecessor of any or all of the timber removed within the applicable limitations?

Issues of Law

I.

Under the May 4, 1942, contract was Siuslaw or defendant, as its successor, entitled to remove only the old growth and second growth fir and hemlock timber which was merchantable on May 4, 1942, and not that which may have become merchantable thereafter?

II.

May extrinsic evidence be introduced to show the intention of the parties with respect to the timber conveyed by said contract?

III.

Is plaintiff entitled to recover single, double or treble damages for the removal by defendant or its predecessor of 8,000 board feet of cedar timber?

IV.

Under the facts and circumstances in this action, did defendant or defendant's predecessor in interest abandon or relinquish its interest in any timber on the land involved prior to the time of its removal?

V.

Under the facts and circumstances in this action is estoppel available to defendant as a defense?

VI.

Is plaintiff estopped by his conduct or by any alleged consent from recovering all or any of the damages otherwise recoverable by him in this action?

VII.

If any right or rights of action against defendant accrued to plaintiff, what limitation period or periods is or are applicable to such right or rights?

VIII.

Is the applicable period or are the applicable periods of limitations measured from the date of the filing of the original complaint herein or from the date of the filing of the amended complaint herein?

IX.

Did plaintiff acquire the right or rights of action of his predecessors against defendant and its predecessor by virtue of the assignment involved?

X.

If defendant cut and removed any timber from plaintiff's property which was not conveyed by the contract, would it be liable in double or treble damages therefor if it were done under a mistake of law

based upon an erroneous construction of the May 4, 1942, contract?

XI.

If plaintiff consented to the removal by defendant or its predecessor of all or any of the timber involved herein, is he barred from recovering all or any of the damages otherwise recoverable by him in this action?

The foregoing pretrial order, having been approved by the parties, is hereby entered herein, and it shall not be amended at the trial, except by consent of the parties and with the approval of the Court, except to prevent manifest injustice.

/s/ JAMES C. DEZENDORF,
Of Attorneys for Plaintiff.

/s/ HUGH L. BIGGS,
Of Attorneys for Defendant.

Dated at Portland, Oregon, this 12th day of May, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed May 12, 1958.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial before the undersigned, a judge of this court, sitting at Eugene, Oregon, on the 14th day of May, 1958. Plaintiff appeared in person and by James C. Dezendorf and Lewis Hoffman, his attorneys. Defendant appeared by Hugh L. Biggs, Robert H. Huntington and Donald R. Husband, its attorneys.

The parties, having waived trial by jury, thereupon offered testimony and evidence in support of their respective contentions and rested. The court, having considered all matters of fact and law arising on the pretrial order and presented by the parties and now being fully advised, makes the following

Findings of Fact

The parties stipulated certain facts which were set forth in the pretrial order as Agreed Facts. They are adopted and set forth herein immediately following as part of the court's findings, being paragraph numbers I to XI, inclusive.

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in

controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife, were the owners of the following described real property, to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9, West of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of Section 6, Township 19 South, Range 9 West of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West of the Willamette Meridian, all in Lane County, Oregon

together with all trees and timber thereon.

III.

On the 4th day of May, 1942, said Warlicks entered into a timber sales agreement with Siuslaw Forest Products, Inc., by the terms of which the Warlicks agreed, among other things, to sell to Siuslaw and Siuslaw agreed to purchase and remove "all of the merchantable old growth and second growth

fir and hemlock timber either standing or down and now growing or located" upon the real property above described, which said agreement also provided as follows:

"It is expressly understood that the Vendee (Siuslaw) shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such not to exceed five years, additional time as may be reasonably necessary to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

That Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)."

IV.

On October 29, 1942, the Warlicks conveyed to G. E. Tucker and Marilla W. Tucker, husband and wife, and S. W. Tucker and Dorothy S. Tucker, husband and wife, the real property described

above, except for the timber upon the premises theretofore sold by grantors (Warlicks) under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

V.

On the 14th day of July, 1952, the Tuckers, referred to in paragraph IV, entered into a contract with the plaintiff, wherein the Tuckers agreed to sell and plaintiff agreed to buy all of the Tuckers' interest in the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records. Subsequently, pursuant to the terms of the said contract, the Tuckers conveyed to plaintiff the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

VI.

On the 1st day of May, 1953, defendant United States Plywood Corporation, acquired all of the assets and assumed all of the liabilities of Siuslaw Forest Products, Inc., and thereafter caused Siuslaw to be dissolved.

VII.

On November 16, 1956, the Tuckers executed and delivered to plaintiff a document entitled "Assignment," wherein the Tuckers undertook to assign all their right, title and interest in and to any and

all claims they then had or in the past had had against Siuslaw Forest Products, Inc., and/or defendant arising from or in any way connected with the timber or timber rights located on the real property above described, or in any way connected therewith from the date the Tuckers acquired the right to possession of said real property and the timber thereon to the date that they sold it to plaintiff.

VIII.

Defendant paid certain taxes and assessments on the timber located on the real property above described.

IX.

In the year 1949 defendant's predecessor, Siuslaw Forest Products, Inc., commenced logging operations on the real property above described. Thereafter said logging operations were carried on from time to time by said Siuslaw Forest Products, Inc., and/or defendant until the year 1956. During the period between 1949 and 1956, defendant and its predecessor, Siuslaw Forest Products, Inc., cut and removed the following species and quantity of timber from the said real property:

Description	M Board Feet
Old growth Douglas fir	6,730
Second growth Douglas fir	4,156
Hemlock	591
Cedar	8
<hr/>	
Total	11,485

X.

Plaintiff and defendant entered into a certain logging contract dated August 10, 1955, pursuant to which plaintiff, as a logger for defendant, cut and removed 108 M board feet of the total timber described in paragraph IX about from portions of the real property above described and delivered the same to defendant. Some of the timber on the premises cut by plaintiff was not removed therefrom.

XI.

Plaintiff made no objection or remonstrance to defendant or its predecessor about the quantity, quality, size or species of the timber which they were cutting and removing from said premises until the spring of 1956.

The court finds from the evidence introduced on the trial the following additional facts:

XII.

The land upon which the timber in question was situated (hereinafter referred to as the Seaver tract) is in the Coastal Range near the community of Mapleton in Lane County, Oregon. The predominant species and grades of timber in that area were those described in the contract of May 4, 1942. At that time and for years prior thereof, it was the prevailing custom and practice in the area to purchase timber by the stand rather than by individual trees. These transactions commonly involved either the purchase of the fee, together with the timber

thereon, or the timber as a separate estate from the land.

XIII.

In 1942 and subsequent years, including the period during which defendant and Siuslaw cut and removed timber from the Seaver tract, customary logging practices in the fir and hemlock regions in Western Oregon, including the Mapleton area, consisted of so-called high lead or donkey logging whereby specific stands being logged were logged clean, except for seed trees, in that individual trees within a particular stand which were not actually felled and bucked, were nevertheless knocked down or destroyed as a necessary incident of the logging operations. Good logging and forestry practices required that timber which was not removed from the logged area for use be burned as slash.

XIV.

In the Mapleton area, as well as other fir-growing areas, in 1942, old growth fir produced peeler logs which were then in increasing demand in the plywood industry as well as saw logs for which there was then and for many years prior thereto had been an active and ready market. Although old growth fir was in greater demand than second growth fir, nevertheless a substantial and growing demand then existed in this area for second growth fir stands, second growth fir logs and second growth fir products, such as poles, piling and numerous manufactured products, including car decking, ties,

bridge decking, studs, planks, siding and other lumber products for building and construction purposes.

Hemlock logs, in 1942 and in years prior and subsequent thereto, were being regularly sold primarily for pulp to paper manufacturers in the State of Oregon. In 1941 and 1942, Siuslaw was engaged in logging hemlock timber on other tracts in the general vicinity of the Seaver tract and selling it for pulp to Crown Zellerbach, a paper manufacturing company.

XV.

The Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged and rough area into which no logging roads had been constructed. The Warlicks had purchased the tract in 1935 for use as a family recreational retreat. Mr. Warlick negotiated the contract with Siuslaw for the purpose of converting into cash the value of the timber. It was Warlick's desire that the timber not be severed and removed immediately. Warlick sought out Siuslaw as a likely purchaser of the timber because Siuslaw had acquired substantial blocks of timber in adjacent areas, some of which were directly contiguous to the Seaver tract.

XVI.

At the time the parties were negotiating the timber purchase contract, Siuslaw was planning a multipurpose logging program for the utilization of its timber in the Mapleton area, not merely for saw logs but also for poles, piling, bridge decking, ties, pulp and other lumber products. It had embarked

upon the construction of a logging road toward and into part of its lands adjacent to the Seaver tract. It was completing construction of a lumber mill at Mapleton for the purpose of sawing and processing logs from its timber in that area and it was interested in acquiring lands contiguous to its other holdings.

In May of 1942 and immediately prior thereto during the negotiations between Siuslaw and Warlick for the purchase of the timber on the Seaver tract, the parties did not know when the tract would become operable because of many factors then undetermined. For instance, they did not know when the logging road would be extended to the Seaver tract or precisely in what manner or at what time the tract would be logged. These factors would be governed by future development of Siuslaw's over-all logging program. In view of these uncertainties and of Warlick's willingness that the commencement of the logging be delayed, they agreed on a relatively long period of time, that is, a total period of twenty-five years, within which Siuslaw might cut and remove the timber from the tract.

XVII.

Warlick and Siuslaw actually agreed and intended by their agreement to sell and to purchase all of the old growth and second growth fir and hemlock suitable for the purposes above described at the time the contract was negotiated, or which Siuslaw might consider suitable therefor at any time during the life of the contract. The parties did not intend

by the terms of the contract to limit the taking of any of the old growth or second growth fir or hemlock by Siuslaw from the Seaver tract during the life of the contract. They intended and agreed that Siuslaw was privileged to take so much of the timber as it might choose during the term of the contract.

XVIII.

The Tuckers, who purchased the fee from Warlick, and plaintiff, who purchased the fee from the Tuckers, at all times knew of the original intention of the parties with respect to the grades, species and quantity of timber conveyed, and neither the Tuckers nor the plaintiff believed that their respective deeds to the fee vested in them any rights in any of the fir and hemlock which defendant or Siuslaw desired to remove from the tract.

XIX.

The first logging on the Seaver tract was done in 1949. Logging continued each year thereafter until the end of the year 1955. More than half of the total amount of the timber described in Finding No. IX was removed during the years 1949 and 1950. Only a small area was logged in 1951. In 1952 timber was felled, bucked and cold decked but was not removed therefrom until the following year. Major logging on this tract was carried on during the years 1953 and 1955. In 1954 there was an inconsiderable amount of logging on the tract because of a general strike.

The parties stipulated at the trial, and the court finds in accordance therewith, that excluding any timber removed from the property by the plaintiff in 1955 pursuant to his logging contract with defendant, the following species and quantities were removed by defendant or Siuslaw between January 1, 1953, and December 30, 1955:

Species	M Board Feet
Old growth fir	850
Second growth fir	3,125
Hemlock	431
Cedar	8
<hr/>	
Total	4,414

XX.

The Seaver tract was logged as a part of Siuslaw's and defendant's entire holdings in the Mapleton area at all times in a manner consistent with defendant's and Siuslaw's mill inventory requirements and other practical considerations, including the development of a main logging road and spur logging roads. Interruptions in the logging of the Seaver tract were not intended to and did not operate as a relinquishment or abandonment by defendant or Siuslaw of any of the timber thereon.

XXI.

According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942.

XXII.

Both plaintiff and the Tuckers, during the respective periods each owned the fee, requested and received reimbursement from defendant or Siuslaw of fire patrol assessments and that portion of the real property taxes allocable to the timber.

XXIII.

During the entire period that defendant and Siuslaw conducted logging operations upon the Seaver tract, plaintiff lived in close proximity to the tract and was personally familiar with the nature and extent of logging operations being conducted thereon. During this period plaintiff did not have any objection to the severance and removal by defendant and Siuslaw of the fir and hemlock timber for which plaintiff seeks damages in this action.

XXIV.

The conduct of plaintiff and the Tuckers in requesting and obtaining reimbursement of property taxes allocable to the timber and fire patrol assessments, and in failing to protest or object to the cutting and removal of the timber during the course of the logging operations evidences their knowledge of the intention of the original parties to the contract. Additionally, plaintiff, by entering into the logging contract referred to in paragraph X hereof and thereby agreeing that defendant was the owner of all the fir and hemlock timber on the tract and by cutting and removing for defendant some 108,000 board feet of timber from the tract pursuant to

said logging contract, evidenced not merely his consent to the removal of that timber but also his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto.

XXV.

Neither defendant nor Siuslaw ever relinquished or abandoned any of its rights in or to any of the fir and hemlock timber which it acquired by the contract of May 4, 1942.

The logging affidavits filed in 1950 and 1951 by Frank McPherson (logging superintendent for Siuslaw) with the Lane County Assessor stating that all of the merchantable fir and hemlock timber had been removed from a large segment of the Seaver tract, were intended by McPherson to reflect the status of the initial timber inventory in Siuslaw's timber depletion records. This initial inventory had been recorded without the benefit of a cruise or other accurate information as to volume and represented only an estimate of the amount of Siuslaw's timber holdings on the Seaver tract and surrounding and adjacent tracts.

When McPherson filed the logging affidavits, he had not personally inspected the entire Seaver tract, and was unaware of large tracts of remaining timber thereon in ravines and on ridge slopes into which spur logging roads had not yet been constructed. The terrain of these ravines and ridge

slopes on which the remaining timber stood was comparable to the terrain of other portions of the Seaver tract theretofore logged by Siuslaw. McPherson made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived. On the other hand, defendant did pay taxes on the remaining timber after the McPherson affidavits were filed. McPherson was not an officer of Siuslaw or of defendant and was not authorized in preparing and filing the affidavits to relinquish, abandon or in any way prejudice his employer's title to any of the timber, and he did not intend to do so either by the filing of the logging affidavits or by his conduct in any other particular.

XXVI.

The 8,000 board feet of cedar referred to in paragraph IX hereof consisted of only five trees. It was not included in the contract of May 4, 1942, and defendant so admitted on the trial. The value of the cedar was stipulated by the parties to be \$5 per thousand board feet at the time of its severance, or a total of \$40. The circumstances surrounding the cutting and removal of the cedar do not evidence such intentional or wilful wrongdoing on the part of defendant as to justify treble damages.

XXVII.

Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a

bona fide belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.

From the foregoing findings of fact, the court draws the following

Conclusions of Law

I.

The cutting and removal of the cedar timber was casual and involuntary, and plaintiff is entitled to judgment against defendant in the sum of \$80, being double the value thereof.

II.

The term "merchantable" as used in relation to the timber described in the contract of May 4, 1942, in and of itself involves some ambiguity concerning the intention of the parties to the contract, requiring a consideration of the circumstances surrounding the parties at the time the contract was made and the attitude of the parties toward the subject matter subsequent to the execution of the contract. As intended, used and construed by the original parties to the contract and their successors in interest, the terms "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located," included all of the fir and hemlock timber cut and removed by defendant and Siuslaw.

III.

Defendant owned and was privileged to cut and remove all of the old growth and second growth fir and hemlock timber for which claim is made by plaintiff against defendant.

IV.

Plaintiff consented to the removal by defendant and Siuslaw of all of the fir and hemlock timber for which he claims damages in this action.

V.

Neither the defendant nor Siuslaw intended to or did relinquish or abandon any of its rights to the timber involved.

VI.

Defendant is the prevailing party and is entitled to its costs incurred herein.

Done and dated this day of, 1958.

.....,

United States District Judge.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT TENDERED BY DEFENDANT

Comes now plaintiff and makes and files the following objections to the Findings of Fact, Con-

clusions of Law and Judgment tendered by the defendant herein.

Findings of Fact

I.

Plaintiff objects to proposed Finding XII, commencing with the words "At that time" in line 2 on page 6 thereof, through the balance of said Finding for the reasons and upon the grounds that (a) there is no evidence to support this portion of the proposed Finding; (2) it is not in accord with the undisputed testimony which was that there were four methods in use in Lane County in May of 1942 for selling and purchasing timber, which were, first, purchase and sell the land, which of course would include the growing timber; second, purchase and sell all the timber but not the land; third, purchase and sell specified or all of the merchantable timber but not the land, and fourth, purchase and sell specified or all of the timber above certain diameters.

II.

Plaintiff objects to proposed Finding XIII for the reasons and upon the grounds that (a) there is no evidence to support it; (b) what customary or good logging practices may or may not have been is not relevant to any issue involved in this proceeding, and (c) there is no evidence in the case that any such customary or good logging practices were performed in connection with the logging of the timber involved.

III.

Plaintiff objects to proposed Finding XIV for the reasons and upon the grounds that (a) there is no evidence to support it; (b) under the uncontradicted evidence the second growth timber on the land involved was not suitable for poles or piling, and (c) the Finding is not relevant to any issue involved in this proceeding.

IV.

Plaintiff objects to proposed Finding XV, commencing with the words "Mr. Warlick negotiated" in line 11 on page 7 thereof, through the balance of said Finding for the reasons and upon the grounds that (a) there is no evidence to support it, and (b) it is not relevant to any issue involved in this proceeding.

V.

Plaintiff objects to the first paragraph of proposed Finding XVI, commencing with the words "At the time" in line 19 on page 7 thereof, through line 28 for the reasons and upon the grounds that (a) there is no evidence to support it and (b) it is not relevant to any issue involved in this proceeding.

VI.

Plaintiff also objects to that portion of proposed Finding XVI, commencing with the words "For instance" in line 1 on page 8, through the balance of said Finding for the reasons and upon the grounds that (a) there is no evidence to support it

and (b) it is not relevant to any issue involved in this proceeding.

VII.

Plaintiff objects to proposed Finding XVII for the reasons and upon the grounds that (a) the May 4, 1942, contract is not ambiguous; (b) the contract speaks for itself; (c) parol evidence of the parties to the contract is not admissible in this proceeding to construe the contract as between plaintiff and defendant herein, and (d) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

VIII.

Plaintiff objects to proposed Finding XVIII for the reasons and upon the grounds that (a) the May 4, 1942, contract is not ambiguous; (b) the contract speaks for itself; (c) parol evidence of the parties to the contract is not admissible in this proceeding to construe the contract as between plaintiff and defendant herein, and (d) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

IX.

Plaintiff objects to the first paragraph of proposed Finding XIX for the reasons and upon the grounds that (a) there is no evidence to support it and (b) it is contrary to the uncontradicted evidence.

X.

Plaintiff objects to proposed Finding XX for the

reasons and upon the grounds (a) it is not relevant to any issue involved in this proceeding; (b) in any event it is not supported by the evidence, and (c) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

XI.

Plaintiff objects to proposed Finding XXI for the reasons and upon the grounds that (a) it is contrary to the uncontradicted evidence and (b) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

XII.

Plaintiff objects to proposed Finding XXII for the reasons and upon the grounds (a) it is not relevant to any issue involved in this proceeding and (b) in any event it is not supported by the evidence.

XIII.

Plaintiff objects to proposed Finding XXIII for the reasons and upon the grounds that (a) to the extent that it attempts to add to the agreed facts and the uncontroverted evidence it is not supported by the evidence; (b) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact, and (c) under the agreed and uncontradicted facts estoppel is not available to defendant as a defense and in any event the elements necessary to establish an estoppel as set forth in *Bennett vs. City of Salem*, 192 Or. 531 are not present in this action.

XIV.

Plaintiff objects to the proposed Finding XXIV for the reasons and upon the grounds that (a) there is no evidence to support it; (b) it is contrary to the uncontradicted evidence, and (c) under the uncontradicted evidence neither estoppel nor consent are available to the defendant as defenses in this action.

XV.

Plaintiff objects to the proposed Finding XXV for the reasons and upon the grounds that (a) it is not supported by the uncontradicted evidence; (b) it is not a statement or finding of the ultimate facts in issue in this proceeding; (c) under the admitted facts and circumstances of this action no such Finding or Conclusion can be made, and the good faith of defendant or its predecessor is not an issue in accordance with the applicable law which is established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11; *Kergil vs. Central Oregon Fir Supply Company*, 66 Or. Adv. Shs. 651.

XVI.

Plaintiff objects to all of proposed Finding XXVI, except the first sentence thereof for the reasons and upon the grounds that (a) it is contrary to the uncontradicted evidence in the case; (b) it states a conclusion of law and; (c) it is directly contrary to the treble damage statute Ors. Section 105.810, property interpreted as applied to the uncontradicted evidence.

XVII.

Plaintiff objects to all of proposed Finding XXVII, for the reasons and upon the grounds that (a) there is no evidence to support it; (b) it is contrary to the uncontradicted evidence; (c) it is irrelevant to any issue involved in this proceeding, and (d) if proper at all it is as a Conclusion of Law and it is not a proper subject for a Finding of Fact.

Conclusions of Law

I.

Plaintiff objects to proposed Conclusion of Law I for the reasons and upon the grounds that (a) it is not a proper Conclusion from the relevant admissible facts which were introduced in this proceeding; (b) it is contrary to the law applicable to this proceeding and to the Oregon Treble Damage Statute which is applicable in this action.

II.

Plaintiff objects to proposed Conclusions of Law II and III for the reasons and upon the grounds that (a) they are not proper Conclusions from the relevant admissible facts which were introduced in this proceeding; (b) they are contrary to the law applicable to this action as established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11; (c) the May 4, 1942, contract involved is not ambiguous and defendant and its predecessor acquired only the timber which was merchantable on the date of the contract which, under the undisputed evidence,

was then 5,000,000 board feet, and defendant and its predecessor without legal right or authority removed over 4,000,000 feet of timber (in addition to the 5,000,000 feet bought and sold pursuant to the contract) which was not merchantable on May 4, 1952; (d) under the agreed and uncontroverted facts plaintiff is entitled to a judgment as a matter of law for the timber which was removed by defendant and its predecessor after January 1, 1953, the amount of which was stipulated between the parties at the stumpage prices which were agreed upon between the parties.

III.

Plaintiff objects to proposed Conclusions of Law IV for the reasons and upon the grounds that neither estoppel nor consent are available to defendant in this proceeding on the basis of the agreed and uncontradicted facts as is established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11.

IV.

Plaintiff objects to proposed Conclusion of Law V for the reasons and upon the grounds that based upon the agreed and uncontroverted facts in this action, and applying the law established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11, and *Kergil vs. Central Oregon Fir Supply Company*, 66 Or. Adv. Shs. 651, defendant and its predecessor abandoned that merchantable timber, if any, which remained on the land involved prior to January 1, 1953, and plaintiff is entitled to recover from defendant for the agreed amount of timber that was

removed after January 1, 1953, at the prices agreed to between the parties.

Judgment

I.

Plaintiff objects to the proposed Judgment because under the agreed and uncontroverted facts and the law applicable to this action,

(1) Plaintiff is entitled to recover a judgment against defendant for three times the value of the stipulated quantity of timber which was removed after January 1, 1953, at the stumpage prices stipulated between the parties; and

(2) Plaintiff is entitled to recover treble damages for the cedar which was removed by defendant and its predecessor and not double damages.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed June 19, 1958.

was then 5,000,000 board feet, and defendant and its predecessor without legal right or authority removed over 4,000,000 feet of timber (in addition to the 5,000,000 feet bought and sold pursuant to the contract) which was not merchantable on May 4, 1952; (d) under the agreed and uncontroverted facts plaintiff is entitled to a judgment as a matter of law for the timber which was removed by defendant and its predecessor after January 1, 1953, the amount of which was stipulated between the parties at the stumpage prices which were agreed upon between the parties.

III.

Plaintiff objects to proposed Conclusions of Law IV for the reasons and upon the grounds that neither estoppel nor consent are available to defendant in this proceeding on the basis of the agreed and uncontradicted facts as is established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11.

IV.

Plaintiff objects to proposed Conclusion of Law V for the reasons and upon the grounds that based upon the agreed and uncontroverted facts in this action, and applying the law established by *Hughes vs. Heppner Lumber Company*, 205 Or. 11, and *Kergil vs. Central Oregon Fir Supply Company*, 66 Or. Adv. Shs. 651, defendant and its predecessor abandoned that merchantable timber, if any, which remained on the land involved prior to January 1, 1953, and plaintiff is entitled to recover from defendant for the agreed amount of timber that was

removed after January 1, 1953, at the prices agreed to between the parties.

Judgment

I.

Plaintiff objects to the proposed Judgment because under the agreed and uncontroverted facts and the law applicable to this action,

(1) Plaintiff is entitled to recover a judgment against defendant for three times the value of the stipulated quantity of timber which was removed after January 1, 1953, at the stumpage prices stipulated between the parties; and

(2) Plaintiff is entitled to recover treble damages for the cedar which was removed by defendant and its predecessor and not double damages.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed June 19, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTION TO CONCLUSION
OF LAW VI AND TO THE PROPOSED
JUDGMENT ORDER DECLARING DE-
FENDANT TO BE THE PREVAILING
PARTY AND AWARDING IT COSTS

Comes now plaintiff and makes and files the following objection to defendant's proposed Conclusion of Law VI and to the proposed judgment order declaring defendant to be the prevailing party herein and awarding it costs herein for the reasons and upon the grounds:

(1) Under the Court's opinion plaintiff has been awarded judgment against defendant and no counterclaim was asserted by defendant, and plaintiff, therefore, is the prevailing party herein and is entitled to costs as of course under Rule 54(d) of the Federal Rules of Civil Procedure.

(2) In any event no circumstances exist in this action warranting the Court's exercise of its discretion to deny costs to plaintiff as the prevailing party and to award costs to defendant.

In support of these objections plaintiff relies upon Rule 54(d) of the Federal Rules of Civil Procedure; 10 Cyclopedia of Federal Procedure, Third Edition, Pages 351 to 354, Section 38.05; 6 Moore's Federal Practice, Second Edition, Pages 1305, 1306 and 1308, Paragraph 54.70(4) and (5).

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG, McCOL-
LOCH & DEZENDORF,

/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on regularly for trial before the undersigned, a judge of this court, sitting at Eugene, Oregon, on the 14th day of May, 1958. Plaintiff appeared in person and by James C. Dezendorf and Lewis Hoffman, his attorneys. Defendant appeared by Hugh L. Biggs, Robert H. Huntington and Donald R. Husband, its attorneys.

The parties, having waived trial by jury, thereupon offered testimony and evidence in support of their respective contentions and rested. The court, having considered all matters of fact and law arising on the pretrial order and presented by the parties and now being fully advised, makes the following

Findings of Fact

The parties stipulated certain facts which were set forth in the pretrial order as Agreed Facts.

They are adopted and set forth herein immediately following as part of the court's findings, being paragraph numbers I to XI, inclusive.

I.

Plaintiff is a citizen of the State of Oregon, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

On May 4, 1942, Marvin T. Warlick and Thelma G. Warlick, husband and wife, were the owners of the following-described real property, to wit:

The Southeast quarter, the Southeast quarter of the Northeast quarter, and the Southeast quarter of the Southwest quarter and Lot 4, of Section 31, Township 18 South, Range 9 West, of the Willamette Meridian.

Lots 3, 4, 6 and 7 and the East half of the Northwest quarter of the Southeast quarter, and the East half of the West half of the Northwest quarter of the Southeast quarter of Section 6, Township 19 South, Range 9 West, of the Willamette Meridian. Lot 1 of Section 1, Township 19 South, Range 10 West, of the Willamette Meridian, all in Lane County, Oregon.

together with all trees and timber thereon.

III.

On the 5th day of May, 1942, said Warlicks entered into a timber sales agreement with Siuslaw

Forest Products, Inc., by the terms of which the Warlicks agreed, among other things, to sell to Siuslaw and Siuslaw agreed to purchase and remove "all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located" upon the real property above described, which said agreement also provided as follows:

"It is expressly understood that the Vendee (Siuslaw) shall have twenty (20) years from the date hereof within which to commence the cutting and removal of said timber and such not to exceed five years, additional time as may be reasonably necessary to complete the cutting and removal of the timber sold and purchased hereunder, all provided that the initial operation of cutting and removal shall be commenced within twenty years from the date hereof."

That Siuslaw should pay "any and all taxes and fire patrol assessments or other assessments if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned by the Vendee (Siuslaw)."

IV.

On October 29, 1942, the Warlicks conveyed to

G. E. Tucker and Marilla W. Tucker, husband and wife, and S. W. Tucker and Dorothy S. Tucker, husband and wife, the real property described above, except for the timber upon the premises theretofore sold by grantors (Warlicks) under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

V.

On the 14th day of July, 1952, the Tuckers, referred to in paragraph IV, entered into a contract with the plaintiff, wherein the Tuckers agreed to sell and plaintiff agreed to buy all of the Tuckers' interest in the real property above described except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records. Subsequently, pursuant to the terms of the said contract, the Tuckers conveyed to plaintiff the real property above described, except for the timber upon the premises theretofore sold by the grantors under that certain contract recorded at Volume 232, Page 615, Lane County, Oregon, deed records.

VI.

On the 1st day of May, 1953, defendant United States Plywood Corporation acquired all of the assets and assumed all of the liabilities of Siuslaw Forest Products, Inc., and thereafter caused Siuslaw to be dissolved.

VII.

On November 16, 1956, the Tuckers executed and delivered to plaintiff a document entitled "Assign-

ment," wherein the Tuckers undertook to assign all their right, title and interest in and to any and all claims they then had or in the past had had against Siuslaw Forest Products, Inc., and/or defendant arising from or in any way connected with the timber or timber rights located on the real property above described, or in any way connected therewith from the date the Tuckers acquired the right to possession of said real property and the timber thereon to the date that they sold it to plaintiff.

VIII.

Defendant paid certain taxes and assessments on the timber located on the real property above described.

IX.

In the year 1949 defendant's predecessor, Siuslaw Forest Products, Inc., commenced logging operations on the real property above described. Thereafter said logging operations were carried on from time to time by said Siuslaw Forest Products, Inc., and/or defendant until the year 1956. During the period between 1949 and 1956, defendant and its predecessor, Siuslaw Forest Products, Inc., cut and removed the following species and quantity of timber from the said real property:

Description	M Board Feet
Old growth Douglas fir	6,730
Second growth Douglas fir	4,156
Hemlock	591
Cedar	8
<hr/>	
Total	11,485

X.

Plaintiff and defendant entered into a certain logging contract dated August 10, 1955, pursuant to which plaintiff, as a logger for defendant, cut and removed 108 M board feet of the total timber described in paragraph IX above from portions of the real property above described and delivered the same to defendant. Some of the timber on the premises cut by plaintiff was not removed therefrom.

XI.

Plaintiff made no objection or remonstrance to defendant or its predecessor about the quantity, quality, size or species of the timber which they were cutting and removing from said premises until the spring of 1956.

The court finds from the evidence introduced on the trial the following additional facts:

~~_____~~

XI-A

It was stipulated at the trial that during the years involved the species of timber involved had the following stumpage values:

Description	1950	1951	1952	1953	1954	1955
Old growth Douglas fir.....	15	19	24	29	30	30
Second growth Douglas fir.....	5	9	14	19	24	25-30
Hemlock	1	2	3	4	5	5
Cedar	--	---	---	5	---	---

XII.

The land upon which the timber in question was situated (hereinafter referred to as the Seaver

.....

tract) is in the Coastal Range near the community of Mapleton in Lane County, Oregon. The predominant species and grades of timber in that area were those described in the contract of May 4, 1942. At that time and for years prior thereto, it was the prevailing custom and practice in the area to purchase timber by the stand rather than by individual trees.

XIII.

In 1942 and subsequent years, including the period during which defendant and Siuslaw cut and removed timber from the Seaver tract, customary logging practices in the fir and hemlock regions in western Oregon, including the Mapleton area, consisted of so-called high lead or donkey logging whereby specific stands being logged were logged clean, except of seed trees, in that individual trees within a particular stand which were not actually felled and bucked, were nevertheless knocked down or destroyed as a necessary incident of the logging operations. Good logging and forestry practices required that timber which was not removed from the logged area for use be burned as slash.

XIV.

In the Mapleton area, as well as other fir-growing areas, in 1942, old growth fir produced peeler logs which were then in increasing demand in the plywood industry as well as saw logs for which there was then and for many years prior thereto had been an active and ready market. Although old growth fir was in greater demand than second

growth fir, nevertheless a substantial and growing demand then existed in this area for second growth fir stands, second growth fir logs and second growth fir products, such as poles, piling and numerous manufactured products, including car decking, ties, bridge decking, studs, planks, siding and other lumber products for building and construction purposes.

Hemlock logs, in 1942 and in years prior and subsequent thereto, were being regularly sold primarily for pulp to paper manufacturers in the State of Oregon. In 1941 and 1942 Siuslaw was engaged in logging hemlock timber on other tracts in the general vicinity of the Seaver tract and selling it for pulp to Crown Zellerbach, a paper manufacturing company.

XV.

The Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged and rough area into which no logging roads had been constructed. The Warlicks had purchased the tract in 1935 for use as a family recreational retreat. Mr. Warlick negotiated the contract with Siuslaw for the purpose of converting into cash the value of the timber. It was Warlick's desire that the timber not be severed and removed immediately. Warlick sought out Siuslaw as a likely purchaser of the timber because Siuslaw had acquired substantial blocks of timber in adjacent areas, some of which were directly contiguous to the Seaver tract.

XVI.

At the time the parties were negotiating the timber purchase contract, Siuslaw was planning a multipurpose logging program for the utilization of its timber in the Mapleton area, not merely for saw logs but also for poles, piling, bridge decking, ties, pulp and other lumber products. It had embarked upon the construction of a logging road toward and into part of its lands adjacent to the Seaver tract. It was completing construction of a lumber mill at Mapleton for the purpose of sawing and processing logs from its timber in that area and it was interested in acquiring lands contiguous to its other holdings.

In May of 1942 and immediately prior thereto during the negotiations between Siuslaw and Warlick for the purchase of the timber on the Seaver tract, the parties did not know when the tract would become operable because of many factors then undetermined. For instance, they did not know when the logging road would be extended to the Seaver tract or precisely in what manner or at what time the tract would be logged. These factors would be governed by future development of Siuslaw's overall logging program. In view of these uncertainties and of Warlick's willingness that the commencement of the logging be delayed, they agreed on a relatively long period of time, that is, a total period of twenty-five years, within which Siuslaw might cut and remove the timber from the tract.

XVII.

The Tuckers, who purchased the fee from Warlick, and plaintiff, who purchased the fee from the Tuckers, at all times knew of the original intention of the parties with respect to the grades, species and quantity of timber conveyed, and neither the Tuckers nor the plaintiff believed that their respective deeds to the fee vested in them any rights in any of the fir and hemlock which defendant or Siuslaw desired to remove from the tract.

XVIII.

The first logging on the Seaver tract was done in 1949. Logging continued each year thereafter until the end of the year 1955. More than half of the total amount of the timber described in Finding No. IX was removed during the years 1949 and 1950. Only a small area was logged in 1951. In 1952 timber was felled, bucked and cold decked but was not removed therefrom until the following year. Major logging on this tract was carried on during the years 1953 and 1955. In 1954 a general strike in the logging industry caused a shutdown of the defendant's logging activities in the area with the result that a relatively small quantity of timber on the Seaver tract was logged during the year.

XIX.

The parties stipulated at the trial, and the court finds in accordance therewith, that excluding any timber removed from the property by the plaintiff in 1955 pursuant to his logging contract with defendant, the following species and quantities were

removed by defendant or Siuslaw between January 1, 1953, and December 30, 1955:

Species	M Board Feet
Old growth fir	850
Second growth fir	3,125
Hemlock	431
Cedar	8
<hr/>	
Total	4,414

XX.

The Seaver tract was logged as a part of Siuslaw's and defendant's entire holdings in the Mapleton area at all times in a manner consistent with defendant's and Siuslaw's mill inventory requirements and other practical considerations, including the development of a main logging road and spur logging roads. Interruptions in the logging of the Seaver tract were not intended to and did not operate as a relinquishment or abandonment by defendant or Siuslaw of any of the timber thereon.

XXI.

According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942.

XXII.

Both plaintiff and the Tuckers, during the respective periods each owned the fee, requested and received reimbursement from defendant or Siuslaw

of fire patrol assessments and that portion of the real property taxes allocable to the timber.

XXIII.

During the entire period that defendant and Siuslaw conducted logging operations upon the Seaver tract, plaintiff lived in close proximity to the tract and was personally familiar with the nature and extent of logging operations being conducted thereon. From the time in 1952 when plaintiff first acquired his interest in this tract until the filing of this action in 1956 plaintiff did not have any objection to the severance and removal by defendant and Siuslaw of the fir and hemlock timber for which plaintiff seeks damages in this action.

XXIV.

The conduct of plaintiff and the Tuckers in requesting and obtaining reimbursement of property taxes allocable to the timber and fire patrol assessments, and in failing to protest or object to the cutting and removal of the timber during the course of the logging operations, evidences their knowledge of the intention of the original parties to the contract. Additionally, plaintiff, by entering into the logging contract referred to in paragraph X hereof and thereby agreeing that defendant was the owner of all the fir and hemlock timber on certain areas of the tract and by cutting and removing for defendant some 108,000 board feet of timber from the tract pursuant to said logging contract, evidenced not merely his consent to the

removal of that timber but also his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto.

XXV.

Neither defendant nor Siuslaw ever relinquished or abandoned any of its rights in or to any of the fir and hemlock timber which it acquired by the contract of May 4, 1942.

The logging affidavits filed in 1950 and 1951 by Frank McPherson logging superintendent for Siuslaw) with the Lane County Assessor stating that all of the merchantable fir and hemlock timber had been removed from a large segment of the Seaver tract, were intended by McPherson to reflect the status of the initial timber inventory in Siuslaw's timber depletion records. This initial inventory had been recorded without the benefit of a cruise or other accurate information as to volume and represented only an estimate of the amount of Siuslaw's timber holdings on the Seaver tract and surrounding and adjacent tracts.

When McPherson filed the logging affidavits, he had not personally inspected the entire Seaver tract, and was unaware of large tracts of remaining timber thereon in ravines and on ridge slopes into which spur logging roads had not yet been constructed. The terrain of these ravines and ridge slopes on which the remaining timber stood was

comparable to the terrain of other portions of the Seaver tract theretofore logged by Siuslaw. McPherson made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived. On the other hand, defendant did pay taxes on the remaining timber after the McPherson affidavits were filed. McPherson was not an officer of Siuslaw or of defendant and was not authorized in preparing and filing the affidavits to relinquish, abandon or in any way prejudice his employer's title to any of the timber, and he did not intend to do so either by the filing of the logging affidavits or by his conduct in any other particular.

XXVI.

The 8,000 board feet of cedar referred to in paragraph IX hereof consisted of only five trees. It was not included in the contract of May 4, 1942, and defendant so admitted on the trial. The value of the cedar was stipulated by the parties to be \$5 per thousand board feet at the time of its severance, or a total of \$40. The circumstances surrounding the cutting and removal of the cedar do not evidence such intentional or wilful wrongdoing on the part of defendant as to justify treble damages.

XXVII.

Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a

bona fide belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.

From the foregoing findings of fact, the court draws the following

Conclusions of Law.

I.

The cutting and removal of the cedar timber was casual and involuntary, and plaintiff is entitled to judgment against defendant in the sum of \$80, being double the value thereof.

II.

Plaintiff's broad contention that none of the second growth fir and hemlock was conveyed by the contract of May 4, 1942, because no timber of these classes was merchantable on that date is untenable. The inclusion of these classes of timber in the contract establishes the parties' intention to convey timber of these classes in some quantity and of some degree of quality. The quantity and quality of the second growth fir and hemlock conveyed by the contract is to be measured together with the quantity and quality of the old growth fir timber by the term "merchantable." This term is to be construed in the light of the evidence showing the intention and understanding of the parties, the situation of the subject matter of the contract and of the parties themselves, and the meaning of

the term prevailing in the area. As so construed and applied to the facts of this case, all of the old growth and second growth fir and hemlock timber cut and removed from the Seaver tract by defendant and its predecessor was merchantable at the time of the execution of the contract.

III.

Defendant owned and was privileged to cut and remove all of the old growth and second growth fir and hemlock timber for which claim is made by plaintiff against defendant.

IV.

Plaintiff consented to the removal by defendant and Siuslaw of all of the fir and hemlock timber for which he claims damages in this action.

V.

Neither the defendant nor Siuslaw intended to or did relinquish or abandon any of its rights to the timber involved.

Done and dated this 16th day of July, 1958.

/s/ GUS J. SOLOMON,

United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed July 16, 1958.

United States District Court
For the District of Oregon

Civil No. 8695

JOHN N. SEAVER, JR.,

Plaintiff,

vs.

UNITED STATES PLYWOOD CORPORATION,
Defendant.

JUDGMENT ORDER

The court having heretofore made and entered its Findings of Fact and Conclusions of Law herein and the case now coming on for judgment in accordance therewith, now based thereon,

It Is Considered, Ordered and Adjudged that plaintiff have and he is hereby granted judgment against defendant for the sum of \$80. No costs.

Done and dated this 16 day of July, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed July 16, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John N. Seaver, the plaintiff above named, hereby appeals to the Court

of Appeals for the Ninth Circuit from the final judgment entered in this action on July 16, 1958.

BAILEY, HOFFMAN &
SPENCER,

/s/ LEWIS HOFFMAN.

KOERNER, YOUNG,
McCOLLOCH & DEZENDORF,
/s/ JAMES C. DEZENDORF,
Attorneys for Plaintiff.

Service of copy acknowledged.

[Endorsed]: Filed August 14, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We the undersigned jointly and severally acknowledge that we and our successors and assigns are bound to pay to United States Plywood Corporation, defendant, the sum of \$250.00.

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed August 14, 1958, from the final judgment entered in this action on July 16, 1958, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed, or such costs as

the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated at Portland, Oregon, this 14th day of August, 1958.

JOHN N. SEAVER, JR.,

By /s/ JAMES C. DEZENDORF,
One of His Attorneys.

GENERAL INSURANCE
COMPANY OF AMERICA,
Surety,

By /s/ C. HUNT LEWIS, JR.,
Attorney in Fact.

Countersigned at Portland, Oregon :

LEWIS & CARTWRIGHT,
INC.,

By /s/ D. M. DEAMOND,
Resident Agent.

[Endorsed]: Filed August 15, 1958.

United States District Court
District of Oregon
No. Civil 8695

JOHN N. SEAVER, JR.,

Plaintiff,

vs.

UNITED STATES PLYWOOD CORPORA-
TION,

Defendant.

Before: Honorable Gus J. Solomon,
United States District Judge.

TRANSCRIPT OF PROCEEDINGS

Eugene, Oregon—May 14, 15 and 16, 1958.

Appearances:

Messrs. JAMES C. DEZENDORF and
LEWIS G. HOFFMAN,
Attorneys for Plaintiff.

Messrs. HUGH L. BIGGS,
ROBERT H. HUNTINGTON and
DONALD R. HUSBAND,
Attorneys for Defendant.

(Whereupon the following proceedings were
had:)

Afternoon Session

(At 2:00 o'clock p.m. the following matter
came on for hearing:)

The Court: All right. I understood you were going to make some statements first.

Mr. Dezendorf: Yes, your Honor. From the standpoint of the plaintiff I think it might be helpful for us to give you a short statement as to what we expect to prove and what our contentions are with respect to the law.

We expect the evidence to show that negotiations between Mr. Warlick, who was the original owner of the property involved, and Mr. Davidson, who was the principal in Siuslaw Forest Products, commenced in 1941 and the contract was executed finally in May of 1942, which is the first exhibit in the case.

The provisions of the contract which are material are quoted in the admitted facts in the pretrial order, so that I don't need to refer to those beyond that at this moment.

Secondly, \$7,000 was the consideration that was paid by Davidson to Warlick. And we expect the evidence to show that the parties discussed and believed that they were dealing concerning 5,000,000 feet of merchantable timber.

Thirdly, the evidence will show that in one of the admitted exhibits that Siuslaw timber inventory and depletion [2*] records were set up in 1945 and just slightly less than 5,000,000 feet of timber was stated to be on the property involved.

The Court: What kind of records?

Mr. Dezendorf: They are timber inventory and depletion records which were set up in 1945.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: What does that mean? What does that show?

Mr. Dezendorf: It shows actually 4,882,000 feet of timber on the property involved.

The Court: No. What is the evidentiary significance of that inventory and depletion record?

Mr. Dezendorf: It is what they thought was on the property that they had bought from Mr. Warlick. And it showed as they logged it—they would deplete until they finally had it all depleted at the end of their fiscal year, April 30th, 1951.

Now, logging commenced on the property in 1949 and was completed some time in 1950, by which time 6,000,000 feet-plus of timber had been removed.

The Court: When did the logging start?

Mr. Dezendorf: '49 through '50, by which time over 6,000,000 feet had been removed. And on their timber depletion records they showed the timber completely depleted and they then filed complete timber removal affidavits with the Assessor of Lane County. [3]

The Court: That's in 1950?

Mr. Dezendorf: At the end of 1950, right.

Now, U. S. Plywood apparently acquired the stock of Siuslaw and Siuslaw was dissolved in 1953. Its assets were distributed to U. S. Plywood. Logging again was commenced on the land in that year of 1953 and 3,944,000 feet principally of second-growth fir was cut, and again in 1955 another 488,000 of second-growth fir was cut.

The Court: Now, they started again in '53?

Mr. Dezendorf: Right.

The Court: And they took off how much?

Mr. Dezendorf: 3,944,000 feet principally of second-growth fir. There was some minor amount of old-growth.

The Court: And in 1954 how much did they take off?

Mr. Dezendorf: None.

The Court: Oh. I thought you said you had some——

Mr. Dezendorf: In 1955 they took another 488,000 feet of second-growth fir.

The Court: All right.

Mr. Dezendorf: Now, it is what was cut and removed in 1953 and 1955 that we are complaining about in this proceeding. In all, defendant and its predecessor took over twice as much timber from the land as Warlick and Davidson bargained for in 1942. [4]

The Court: Is that unusual?

Mr. Dezendorf: It is where you buy merchantable timber. Now, there are four ways of buying and acquiring timber: The first is to buy the fee, in which event, of course, you get all that's on the land; the second is to buy all the timber and not the land; the third is to buy the merchantable timber, and not the land; the fourth is to buy timber above certain dimensions.

Now, it is not uncommon where you own all of the land or all of the timber to cut out more than you thought you had in the first place. But where you buy only the merchantable timber the merchant-

able timber and the timber that you buy is controlled as of the date of the contract and not what may become merchantable thereafter, is our theory of the law.

Now, as I said, I don't really believe there are going to be too many factual disputes in the case.

Our theory of the law is that, Number 1, this contract covers merchantable timber; it's not ambiguous. What was merchantable is a thing which has been defined by the Supreme Court, and it is known to Webster and other dictionaries. So that it's going to be the Court's duty in our view to rule what was merchantable within the meaning of the parties and we say that oral testimony as to what the parties may have meant will not be admissible. [5]

With respect to cedar, the evidence will show without any question from the admitted facts that they removed 8,000 feet of cedar timber which was not mentioned or covered by the contract at all.

The Court: When was that taken off?

Mr. Dezendorf: In 1953 after a timber removal affidavit had been filed on the property. And it was just taken is all and it wasn't covered by the contract in any way.

The Court: When did you file your original complaint in the case?

Mr. Dezendorf: On June 24th, 1956.

The Court: Original complaint, June 24th, 1956?

Mr. Dezendorf: Right.

The Court: When did you say the cedar was taken off?

Mr. Dezendorf: In 1953.

The Court: You don't know the date?

Mr. Dezendorf: The exact date we do not know.

I don't think anyone does.

The Court: What is the statute on that?

Mr. Dezendorf: Six years.

The Court: Six years?

Mr. Dezendorf: Yes.

The Court: For a penalty?

Mr. Dezendorf: Yes; we contend that. Apparently Counsel contends otherwise, but the Supreme Court of Oregon has ruled [6] on it.

The Court: In what case? I didn't look at the briefs. Is it in your brief?

Mr. Dezendorf: It is.

The Court: Well, I will find it, then, after awhile.

Mr. Dezendorf: Yes. It's *Kinzua Lumber Company vs. Daggett*, 203 Ore. 585.

The Court: All right.

Mr. Dezendorf: Now, Counsel apparently in his contentions, at least, makes a point that the statute runs from the date of the filing of the amended complaint, which was in November of '56 instead of June of '56. We, of course, rely on 49(c) of the Federal Rules of Civil Procedure and the other authorities which are cited in our brief.

As far as we can find, this started out as a timber trespass action for treble damages and it has never changed. We see no possible contention that can be made that there is any reason why the

statute should apply from the amended complaint in the original and, in any event, since we are only complaining about the timber that was removed in '53 and '55 I don't know whether it's going to make too much difference.

Now, Counsel contends that we have acquired nothing by virtue of the assignment from the Tuckers to Mr. Seaver, the plaintiff. We believe the law to be that a cause of action for trespass upon land and timber is assignable and we [7] have set forth in our brief the authorities.

The Court: I don't get this theory. After the Tuckers conveyed the land to the plaintiff?

Mr. Dezendorf: Right.

The Court: Some time after they assigned their rights to cause of action against the defendant to the——

Mr. Dezendorf: Mr. Seaver. That's right.

The Court: Yes. I don't understand. Did he reserve or under the law did Tucker have a claim for the timber, having already divested himself of the fee?

Mr. Dezendorf: If the defendant or its predecessor removed timber to which they were not entitled during the time that the Tuckers owned the property, they would have the cause of action.

The Court: Oh. Yes. That's right.

Mr. Dezendorf: So that we were in this case——

The Court: When did the Tuckers convey?

Mr. Dezendorf: In 1952.

The Court: But you are not asking for anything that occurred in 1952 or previous?

Mr. Dezendorf: No. But, of course, we didn't know until the timber cruise was actually completed just about a month or so ago exactly when this timber was removed. So that we were trying to protect ourselves all the way along to get all the rights that we could. [8]

The Court: So, actually, the assignment is meaningless in this case.

Mr. Dezendorf: Well, I am not sure that it is.

The Court: Well, I was trying to find out your position. You told me earlier that you were only claiming for the timber that was taken off in 1953 and 1955. You have also told me——

Mr. Dezendorf: What we are asking——

The Court: ——that the Tuckers conveyed all of their interest in the property to the plaintiff in 1952.

Mr. Dezendorf: Here is what we really claim——perhaps I oversimplified it—we claim that the defendant or its predecessor wrongfully removed any timber which it took from the premises after June 24, 1950. At present we expect our evidence to show that the only timber that we can tie down as having been removed thereafter was removed in 1953 and 1955.

Now, if it should develop during the course of the trial that there was timber taken after June 24, 1950, and before '53, we are going to claim the benefit of that. Now, does that straighten myself out?

The Court: Yes.

Mr. Dezendorf: That's the point we are trying

to make. So that perhaps the assignment is material.

The Court: Well, don't you run into the rule of specificity as far as the pretrial order is concerned in order to make that contention—— [9]

Mr. Dezendorf: Well——

The Court: ——under our local rules?

Mr. Dezendorf: I think I have a contention for everything that was removed after June 24, 1950.

The Court: All right.

Mr. Dezendorf: And I am talking now about what we expect our proof to be.

Now, the next defense that we know about is one where the defendant claims that the plaintiff is estopped from making any claim herein because as of August 19th, 1955—although the evidence will show that it was actually signed in December of 1955—Mr. Seaver entered into a contract with the defendant to remove logs from the extreme south-easterly corner of his piece of property and to deliver them to the defendant.

The Court: Now, I want to get that straight. I have talked to you about that before. Mr. Seaver owned the fee on certain property on which U. S. Plywood has been removing timber.

Mr. Dezendorf: Right.

The Court: Was Mr. Seaver hired by U. S. Plywood to log timber on his own land which U. S. Plywood claimed?

Mr. Dezendorf: Well, he entered into a contract in December of 1955, dated August 19th, 1955, to

remove timber from the extreme southeasterly portion of his tract. [10]

The Court: Well, that wouldn't really make any difference whether it was right in the center of his tract or in the extreme northerly position as part of it, would it? He did remove, he did enter into a contract. Now, why do you say he was not estopped? You told me once before, but I just didn't follow it.

Mr. Dezendorf: There are two reasons: Number 1, Mr. Seaver did not find out that he had a claim against the defendants for removing timber from his property until the spring of 1956, which was after all of the operative facts which are involved in this action had occurred. In order to estop Mr. Seaver the proof would have to show he in some way made a false representation to the defendant that he intended that they should act or change their position based upon his false representation; that they were ignorant of the truth; that they relied upon his false representation and changed their position, to their damage.

Now, we say that there isn't any possibility in the world of the defendant being able to establish that because Mr. Seaver didn't know what his rights were until after all of the operative facts had occurred; therefore, how could he mislead or challenge the defendant into acting upon a false representation that he made in changing his position to his detriment so that a basis for estoppel could exist?

Now, secondly—and I don't as yet have [11]

these cases in the memorandum, but I will give you a supplementary one—I find the law to be that conduct or representations subsequent to the acts of the party asserting the estoppel are legally insufficient because no reliance could have been placed upon them when the acts were committed, which is exactly this case.

The Court: Why?

Mr. Dezendorf: Because if the defendant wrongfully took timber, they took it before Mr. Seaver entered into the contract that they relied upon as an estoppel in December of 1955.

The Court: Well, wouldn't this be an estoppel to all timber removed to 1955 or, at least, the timber on that portion that he took?

Mr. Dezendorf: It could be. If so, it would only amount to 100,000 feet.

The Court: There was a representation, wasn't there, when Seaver said, "I will take the timber;" he says, "I will remove the timber that belongs to you"? He wouldn't go and say, "I will take my own timber." And there was this representation, and there might have been a mistake of law over there but certainly no mistake of fact. Because he is representing that "I am authorized to remove your timber." He wouldn't go and say, "I am going to take this timber and then I am going to sue you for treble damages even though I take it off your land." I mean, there is the misrepresentation. [12]

Mr. Dezendorf: If he had known that they had no right to take it, then I would say there could be an estoppel. He didn't know that they had no

right to take it at that time. And the Court may recall that in speaking about the matter in chambers to us the other day you were of the feeling offhand that, perhaps, an estoppel would apply because Mr. Seaver would be charged with knowledge of whatever was of record.

But if Mr. Seaver is charged with knowledge of what is of record, so is the defendant.

The Court: Yes.

Mr. Dezendorf: It would work equally to each.

The Court: That is true.

Mr. Dezendorf: Therefore, the defendant could not claim any estoppel based upon some imputed knowledge to Mr. Seaver because it would be imputed just as well to them.

The Court: Of course, not very much knowledge could be imputed to each one of them because you didn't win that case until 1955 or '56. Isn't that right?

Mr. Dezendorf: My memory is 1955.

The Court: And the Hughes case came down about that time.

Mr. Dezendorf: That's correct. But I think that gives you a bird's-eye view of our belief as to how the facts will develop and as to how our position is on the law.

There is, perhaps, one thing I should mention before [13] sitting down. The last exhibit that we reserved was the Forest Service records, Mapleton. They are here, but the Government has asked us to photocopy and put photocopies in. So that photocopying is being done at the moment.

The Court: That's all right.

Mr. Biggs: If the Court please, Mr. Dezendorf has given you a very skeletonized view of the case as he sees it. If your Honor is disposed, I would like to make just a little fuller statement.

The Court: Yes, I am disposed.

Mr. Biggs: Thank you, your Honor. It will make the picture just a little fuller.

The facts, substantially, are these, your Honor: Starting, now, with the original parties to the contract, Mr. Marvin T. Warlick owned the Seaver tract prior to 1942. It was a remote area near Mapleton. He used it as a kind of a mountain retreat he had had for a number of years for his own recreation and for his family's recreation. He was a businessman.

Mr. Davidson had been in the logging business and lumbering business up in Washington for a good many years. He had most lately been engaged amongst other activities up there in the cutting of logs and piling and smaller timber which he was supplying to customers down in California.

The Court: Is Mr. Davidson going to be a witness in [14] this case—and Mr. Warlick?

Mr. Biggs: Yes, your Honor. They are both here. They are both living and both are here and both expect to testify. Both of them will be here as a witness for the defendant.

Mr. Davidson then came into this area and started acquiring timber with some men up in Washington, Mr. Ed Eisenhower and Mr. Gonyea. He acquired quite a large tract on contract called the McKenzie

River Tract in this general area which, as the various parcels began to be put together, reached to the Seaver Tract. We will call it the Warlick Tract. Mr. Warlick and Mr. Davidson became well acquainted and friendly. And in the next year or so Mr. Warlick decided he wanted to sell the timber off of that tract. There were some cleared areas on the tract. He was pasturing cattle on there at times and he felt that if he could realize some out of the timber he would like to do it.

They negotiated for some little time. Mr. Davidson wasn't ready to go in there yet to do the logging, didn't know when he would be able to get in there, because it was then not served by any logging roads or ways adequate for the purpose of taking out timber.

So there was no urgency about his acquiring it. But it was next to his property and he had some interest in it. I am sorry, your Honor—you started to say something?

The Court: No. [15]

Mr. Biggs: I see. So that in 1942 they came to an agreement. There is no dispute or misunderstanding between them at all. Both of these gentlemen, I anticipate, will testify in this court that it was the intention of the parties to convey all of the timber on the tract.

The Court: Why do they use the word "merchantable"?

Mr. Biggs: I don't think either one of them knows, your Honor. I think the contract was taken—one of them arranged to have it taken to an at-

torney. We haven't identified the attorney. We suspect it might have been Judge East, although neither of us have talked with Judge East about it. But I think it was a word that was——

The Court: I did. He doesn't remember.

Mr. Biggs: He doesn't remember. Well, then, we don't know who drew the contract.

The Court: He says he knows Mr. Gonyea and he has done some work for him, but he has no recollection of ever having prepared this contract.

Mr. Biggs: Well, that's entirely possible, your Honor. We are only conjecturing.

The Court: That's off the record, then. But that's my own investigation.

Mr. Biggs: My mind is put at rest, then, your Honor.

The Court: Now, what is that blank space in Paragraph 3 on Page 2? [16]

Mr. Biggs: Well, that isn't a blank space. We attempted to reproduce this typewriting because of what we then thought the plaintiff's theory of the case was going to be, exactly how the original contract was written after writing the line above and line below the phrase "not to exceed five years," was inserted after the word "necessary" so as to attempt to clarify the intent of the parties. When this case was originally filed the only claim made in June 24, '56, against the defendant was that they hadn't taken the logs off within the five years that it was then contended by the plaintiff was required under the contract. That was the lawsuit in the beginning and the only lawsuit.

So when this paragraph appeared in the agreed statement of facts I wanted it to show precisely how it was written into the contract. That's the only significance to it. The intention of the parties was so clear, your Honor, on the amount of the timber that was conveyed and sold and taken as to its comprehending the whole amount that Mr. Warlick will testify he went to Mr. Davidson after the contract—some time after the contract and said, "Well, Sherm, I have got a little fencing around here to do and I thought I might try to enlarge my barn. Would you have any objection if I took some of the smaller stuff off for that purpose?" And Sherm said, "Oh, no. Go ahead. Whatever little you take for farm purposes will never be missed." I say that just to show you how clearly the [17] parties were thinking that they had all of the timber—all of the timber had been conveyed to Davidson. I feel justified in making that statement in view of the holdings of our Supreme Court that the word "merchantable" in itself imports an ambiguity and requires the extrinsic evidence of the intention of the parties, which is the cardinal principle in determining how the contract should be construed.

Shortly after this view was made Mr. Warlick's private plans changed. He conveyed the fee to Mr. Tucker, who lived out in that area for \$4,000, or about \$4,000. Maybe it was \$4,500. So Mr. Tucker remained the owner of the fee and Siuslaw Forest Products, which was then incorporated, in the

meantime had taken the title to the timber; Mr. Tucker remained the owner of the timber. There is no difficulty between them during those early years or at any time.

In 1944 this company, which had constructed a mill at Mapleton——

The Court: Which company?

Mr. Biggs: The Siuslaw Forest Products Company had just constructed its mill in '41, just for the purpose of milling the stuff on the adjacent areas, the Indian Creek area, started developing a road up to the so-called Jump Creek Area. You will hear that referred to, Jump Creek, and the Hadsall area, which includes the Seaver tract. But it is greater than the Seaver tract. U. S. Plywood at that time had built a mill at [18] Mapleton and was interested in peeler logs primarily and entered into a contract with Siuslaw Forest Products to supply its mill with peeler logs. So that the Siuslaw Forest Products then came into ready money for the construction of their road and they started building their mainline road then, in '43 or '44, logging the areas nearby as they put their logging road through, and making the operating revenues pay the expenses of construction.

They reached the Seaver Tract—the road reached the Seaver Tract in 1948, the latter part of it, or the early part of '49. And, in addition to their logging of other areas in the Jump Creek Tract, they did take some timber off the Seaver Tract in 1949. But they kind of opened it up then to one

area to make it accessible, and in 1950 they started a real logging show on the Seaver Tract.

Now, your Honor, they still were a small company. I say this in anticipation of what Counsel is going to say, and so we will have a true picture. It was a small, growing company primarily engaged in logging and not bookkeeping. The records are not completely consistent. It wasn't until 1949 that Siuslaw even attempted to set up a timber inventory and that was because when the tax statements started coming in they just didn't know how to even check off against the tax statements the property which they owned.

One of the logging superintendents was called into [19] the office and attempted then to set up what they will refer to now as a timber depletion record by opening up or establishing an inventory—additional inventory of the timber that they owned.

He used all of the available information that was in the office. I should say that in 1944 U. S. Plywood acquired an interest in Siuslaw Forest Products but left the management to the local people. And Mr. Davidson had retired from the management. From abstracts of title and from cruises on some of the McKenzie River Tract property and various other sources he acquired information as to what the probable volume of all the timber was, and he started trying to break it down the best he could without the benefit of cruises into some allocable portion of the whole to a particular forty so that they would have a record to work against, knowing that his errors

would be compensating each other; if he assigned too much to one forty he would assign too little to the next forty. And as long as his overcut and undercut wasn't too far out of line it was a workable record to him and would make no ultimate difference in their income tax records.

They are not records that the company is proud of and, certainly, they are not records that are easy for anyone to work with. But they were the best that they had.

In 1950, then, still being considerably understaffed as far as office help is concerned, they put on a good logging [20] operation in the tract and had taken off a good deal of timber. By 1950 it's true that against this initial inventory that they had the logs that came off of that tract equaled or exceeded the initial inventory. So, they showed on their timber depletion record since the balance of timber depleted. That was the reference that Mr. Dezen-dorf made to it. Everything else that came off, then, of the Seaver Tract in the years following was shown as an overcut.

The Court: Let me ask you this: In 1951 did they take off any timber?

Mr. Biggs: Not in 1951.

The Court: Now, what timber did they come back and take off in 1953?

Mr. Biggs: In 1953—'52 they came back. Contrary to Counsel's statement I think our evidence will show——

The Court: All right.

Mr. Biggs: 1951 their mill inventories required

them to supply U. S. Plywood with more peelers and they went up into the McKenzie River Tract area and did no more logging on the Seaver Tract in that year. Now, this is a very rough area. In fact, we have got a stereoscopic map here that I want your Honor to see. It never had been cruised. The logging crew didn't even know what was on the Seaver Tract by cruise or actual count or actually getting around. That seems difficult to believe, your Honor, unless you actually see the steepness [21] of these ridges and ravines and how the timber was disposed on that. They had ended the timber operation up the end of one draw. What lay on the other side of a high ridge nobody actually knew and they didn't go out and actually cruise it. When they pulled out it was to go over to another area in which they were expecting to build up their inventory of peeler logs. And subsequently they returned to the Seaver Tract where they thought they had got most of the old growth. They were coming back, then, to get the second-growth and the stumps that remained on there.

The Court: Now, let me ask you this: Did they take off, say, a 40 clean and they were going back to remove the timber on another tract, another 40, or did they take off certain selected trees the first time off a 40 and come back to clean it up the second time?

Mr. Biggs: No. They didn't take selected trees off, your Honor, because the timber doesn't grow that way. They log by tracts always and they log it fairly clean by tracts. Even the small stuff that

they wouldn't take into the mills they would fell anyway. They had to because of the nature of their logging operation. And they took it clean as they went. But it wouldn't follow section lines because the contour didn't. It followed contour areas and that was misleading. They didn't know where the interior lines were of some of these 40's. They had the exterior lines marked so they wouldn't be [22] getting over on somebody's else's property, but within their own area they only guessed. When they could see a corner where they had been on one 40 they might file an affidavit that they had logged that 40 without, in fact, knowing that on the other side of the ravine there was just as much timber as had been taken off within the actual legal subdivision of that 40. That's where this—but maybe I can pause here for just a minute in view of your Honor's question which you raised.

In this country, which is very different from a pine country because of the way the fir grows, most of the logging is clean logging and not selective logging. The old-growth is quite generally found in a contiguous stand because the old-growth means it's a spot of timber that some of the earlier fires a couple of hundred years ago missed. So it remains old timber. New timber won't grow up in a stand of old-growth. The second-growth starts up in a burned-over area where they have a clean area to grow in and are not blotted—blighted out by the sunlight, although while generally that's the pattern, although there are areas within a 40 that are a mixture of second-growth and old-growth.

The Court: What is your explanation for this certificate of——

Mr. Biggs: Logging off?

The Court: Yes.

Mr. Biggs: That was precisely it. Mr. McPherson will [23] testify to that because he filed the affidavit of logging. It was filed merely through ignorance of what was actually there. If it was carelessness on his part, it was certainly not an intentional, wilful abandonment of the timber. And, short of that, of course, it has no materiality at all.

The Court: Well——

Mr. Biggs: He had no authority to do that.

The Court: ——in that Hughes case the Court did place quite a bit of credence—I think probably the explanation is that all these timber companies cheat the counties. Isn't that the ordinary thing to do? So they have been filing these affidavits for years. So I wanted to know how truthful your witnesses are going to be.

Mr. Biggs: Your Honor, I appreciate the frank statement. I think that there certainly was a custom among logging companies not to be too careful about that. There is another thing, too, your Honor, in those years. The Assessor didn't even have this property on his rolls as timber property. He didn't know what was out there. It had never been cruised and never, in fact outside of the information we furnished them with logging affidavits, never was known to him that it was in fact timberland. He got most of that information from us.

But I think that the loggers in the main felt it

was up to the—speaking generally now—Assessor to know—was to put his own value on it. In any event, this man, your Honor [24] —and I will submit his sincerity to you with my complete sincerity—was not an officer of the company. He never had been, and he wasn't a stockholder. He was out there getting logs rather than keeping records. And his bookkeeping and the book records were sloppy by standards of modern-day business. There is no disposition to dispute that at all.

Now, your Honor, they did come back in 1952. They didn't take timber into the mill in 1952, but they did log a good deal of the timber in 1952 and cold-decked it there for taking in at a later time. They built up their inventory on the property.

They logged in 1953. 1954 they did not log as much. They did some logging, but there was strike trouble and they were closed down a part of the time on that. 1955 they did some logging and were logging through Mr. Seaver as an independent contractor when this lawsuit was filed.

Now, our position is this, your Honor: That the intent of the parties being the governing one there is no dispute at all between the original parties as to what they intended. There is no question, I think, can't be any serious question that Tucker and Seaver both knew what the original parties intended. Tucker, according to Mr. Seaver's deposition, when he attempted to—when he sold Seaver the land and subsequently when he gave Seaver the assignment made no claim to owning any timber

or having any rights against [25] anyone because of the timber on the farm—on that tract. He made no charge for the assignment, didn't receive a dime of consideration for it. He just gave it to——

The Court: Is Tucker going to be here as a witness?

Mr. Biggs: I don't think that he is. We haven't called him. I have developed this information through Mr. Seaver himself on his deposition.

Tucker came in—after he had sold the farm to Seaver—for the first time so far as our records show, that we can find, that he had ever made any claim on us to pay taxes on the timber. In 1952 he did come in and he said—he was down in California much of that time—“Here, I have this contract and it provides for you to pay the timber taxes on it.” And they figured up the taxes and paid them and there was no question about it. He took the——

The Court: They have been paying all the taxes ever since?

Mr. Biggs: They have been paying all the taxes on the timber that has been presented to them, and Seaver has been demanding taxes on the timber every year and has been receiving taxes on the timber. And the fire patrol——

The Court: Tell me that again.

Mr. Biggs: Seaver also has been demanding. He receives a tax statement. He brings it over to defendant and asks for defendant to allocate the part of the—— [26]

The Court: When was the last year he did that?

Mr. Biggs: 1956. Now, let me give you a little of Seaver's understanding of this, your Honor. He is a native in that community. He is a boy that grew up or has lived there a good part of his life on an adjoining tract. He had been over and familiar with this tract that Warlick owned and most of the time that Warlick was on it. He knew Warlick; he knew the timber. He knew when the original logging show started. As a matter of fact, I think he was employed by the Kontich Logging Company who took the first timber off this tract in 1949. He worked, if I recall his testimony——

The Court: Who took it?

Mr. Biggs: Kontich Logging Company, an independent logging company, a gyppo logger hired by Siuslaw, who was doing the logging during some of the years in '52, '53 or '54, or somewhere in there. Seaver was employed by them as a part of their crew to help them take timber off of this tract of land.

Now, your Honor, Counsel says that he didn't know what his rights were in this. I don't know that anybody can say from day to day what a Court might hold in a particular situation. I think that the case we are all talking about is readily distinguishable.

The Court: What case are we talking about?

Mr. Biggs: I mean the Hughes-Heppner case. I think it's readily distinguishable from this on the facts. And I think [27] the law is more helpful to us than them. We will discuss that when we get to it. The fact of the matter is——

The Court: I'd be interested in seeing that.

Mr. Biggs: The fact of the matter is——

The Court: Well, I wouldn't make that statement so far as Daugherty. I think there is some favorable language in there.

Mr. Biggs: Yes.

The Court: But I didn't think that the Hughes case helped you very much.

Mr. Biggs: Well, I think on the issue that merchantability is a question of fact, your Honor——

The Court: Yes.

Mr. Biggs: I think—Seaver from the moment he bought the property or the same year that he bought—that he had a contract to buy it, before he even got the deed—he got the contract in '52 and before he got his deed in '54 had consulted an attorney about rights under that contract. We have a letter the evidence will show is a demand written by Mr. Hoffman to either U. S. Plywood or Siuslaw—I don't know whether it was just before or after that merger—saying, “Mr. Seaver has submitted to me his contract which I have examined. I find no rights under that contract for you to haul timber from your adjoining tracts across my tract on your logging road. You can only take off over that road [28] timber from my tract,” making no reference to the fact that they were cutting stuff that he thought—now was claiming was unmerchantable or objecting in any way. In 1952, prior to the start of this lawsuit and after practically all of this timber had been cut, he again wrote to U. S. Plywood through his attorney, Mr.

Hoffman, again making a claim but not any claim that the timber removed was unmerchantable, at that time saying, "Here you have been logging on here for more than five years and the contract provided that you should have only been on here five years. Your time is up and, therefore, you are a trespasser and I am going to bring an action against you."

In the summer, August or December of 1955, whenever it was that he applied to U. S. Plywood for a logging contract to take off some of this very same timber that he is now talking about, the contract itself recited that U. S. Plywood was the owner of all the timber on the Seaver Tract and there was never any dispute at any time that the contrary was so.

We think those facts, your Honor, not only establish an estoppel; we think stronger than that: They establish a consent to our going on the property and taking the trees.

Now, the importance of that, of course, is to convert whatever rights he should have to—we deny that he has any because we deny there has been any breach of the contract or we deny that there has been anything taken off that property [29] that we weren't entitled to take off by the contract. But an objection to any part of the timber, cedar or anything else, is met by a consent on the part of the plaintiff here to our going on the property.

He was there every day, saw us go on. He saw what we were doing, he made no objections, he didn't protest at all. He asked us to pay——

The Court: Asked you to——

Mr. Biggs: To pay timber taxes. Everything he did was implied to represent——

The Court: But does that refer only to the 100,000 feet?

Mr. Biggs: No, your Honor. That refers to everything that came off since 1949. We don't yet know what Counsel claims, whether his theory is that regardless of the quality and size and specie of timber we are estopped or we must be held to have given up our interest in it by the logging affidavits that we filed, whether that's his theory and, therefore, everything that came off after that time was unlawfully taken off because we had abandoned it, or whether he says that the trees that we were cutting off after that time were too small to be merchantable, or whether he says that none of this timber was salable or of any value in 1942. We have never yet heard from Counsel just precisely what he contends in that connection.

But if it is that we had abandoned the timber our [30] position is, No, we did not. You can't abandon nor relinquish a fee or a title—an interest in real property without a formal conveyancing and without an intent and, in this case, without a corporate intent. This man wasn't an officer of the company and had no authority to abandon or relinquish or give up any of the company's rights. So that if his contention is abandonment we don't see how the facts or the law can either sustain him. If the question is merchantability, the evidence will show that **second-growth and**

old-growth and all of the size and quality and quantity that we took off of that property was merchantable and was actually being manufactured in commercial operations and log manufacture——

The Court: When did the great increase in stumpage take place?

Mr. Biggs: I think it started——

Mr. Dezendorf: After 1950.

The Court: 1950?

Mr. Dezendorf: After 1950.

Mr. Biggs: Probably gradual from about 1950 on, your Honor. There is no question about it. There was a rise in the price.

The Court: That which was unmerchantable before and uneconomic to remove before became merchantable and——

Mr. Biggs: I would say uneconomic. Yes. I think some old-growth or second-growth in areas all over the state were [31] not economic to remove in 1942 and were economic to remove in 1950. I don't think there is any question about that.

The Court: This spread wasn't that long, '42 to '50. How about '48 to '50?

Mr. Biggs: '48 to '50? There was an increase in price, wasn't there, between '42 and '48 during the war years? I can't tell you just what that is. There certainly was, yes, your Honor.

The Court: All right.

Mr. Biggs: It wasn't as much as that. So that our position is that the whole thing being merchantable was conveyed because the parties intended by the meaning of the word "merchantabil-

ity'' in view of their circumstances and of their purposes and all of the surrounding——

The Court: You didn't ask for reformation of the contract?

Mr. Biggs: No, we did not, your Honor, because—I don't know that it's inappropriate. The only thing is if we do ask for reformation it would be to make specific what now is only implied. It wouldn't be saying anything different in the contract. It would simply be saying it more specifically what is there.

The Court: I am asking you, are you required to do that?

Mr. Biggs: I do not think so, your Honor.

The Court: All right. [32]

Mr. Biggs: I do not think so. I suppose that depends on the Court's holding. If the Court holds that extrinsic evidence cannot be used to define merchantability but merchantability is a legal expression subject only to a legal definition——

The Court: Well, I am going to let you determine your own pleadings and your own evidence. I told you that before.

Mr. Biggs: Yes.

The Court: However, I was reading that Daugherty case and that Farragut Pine, and this sentence stuck in my mind. There remains one serious question for consideration. The defendant's cross-complaint does not refer to the growth of the timber, nor does it plead or present any facts showing any ambiguity in the particular

portion of the contract which provides for the sale of merchantable pine and fir timber and which further provides that purchaser is to cut only trees the logs from which will measure 10 inches or more at the top. Now, then, the Court goes on to hold that absent proof and pleadings merchantable timber means timber which is merchantable as of the date of the contract.

Mr. Biggs: Yes. Well, I think that the intention of the parties actually went further than that; that it may very well be in order to get the evidence completely before the Court that we ought to present the issue of reformation so as not to foreclose any showing of intent. But I believe that [33] the intent will show that even as of 1942 all of this that was taken off was merchantable in the definition or the proper construction of the word.

The Court: You don't claim that that cedar was properly——

Mr. Biggs: No, your Honor. I think we made the contention *de minimis*. In a trespass case there isn't a consent to the trespass. I suppose *de minimis* doesn't apply. Actually, the cedar was in such small quantities neither party knew there was any cedar on there and I don't think anybody else ever knew there was any cedar on there.

The Court: 8,000 feet, I think.

Mr. Biggs: Yes. Five trees on a rough area like this. Nobody knew anything about it.

The Court: Do you concede you are liable for stumpage on that?

Mr. Biggs: Yes, I think I would be inclined to

say that. I don't think there is any real issue about that. \$5.00 a thousand, \$40.00.

The Court: \$40.00.

Mr. Biggs: \$40.00. 8,000, \$5.00 a thousand, or—8,000—\$40.00, I believe it is.

Mr. Dezendorf: Of course, if it has to be trebled——

The Court: I don't think he would even object to that.

Mr. Biggs: Well, now, your Honor, that's running into [34] money fast when you start trebling.

The Court: All right.

Mr. Biggs: Was there any other thing? I have kind of said the things that were in my mind, but it may be I haven't covered the things that your Honor had in mind.

The Court: What about this statute of limitations that Mr. Dezendorf has commented upon? Is the statute of limitations involved in this case?

Mr. Biggs: Well, I presume that it is if he is asking for anything prior to—yes. Between June and November of 1950 there would be.

The Court: June and November of what year?

Mr. Biggs: 1950. See, they filed their original complaint in June, 1950.

The Court: I haven't read the original complaint. But I imagine it is here.

Mr. Biggs: It has nothing to do with the issue of merchantability.

Mr. Dezendorf: Just as much as this one does. It's a timber trespass claim and there isn't any——

Mr. Biggs: You probably wanted to say that to

the Court. I wanted to tell the Court just what the facts were here. The original complaint was a trespass, on the theory, your Honor, that we had overstayed our time on the premises; that we were to have gotten off within five years after the start of logging [35] and, therefore, everything that we touched five years after 1949 or, at least, everything that we cut over 1954 was unlawfully cut and we were liable for damages after that. The amended complaint filed November, 1956, covers different periods and a different quality of timber.

It goes back to everything prior to, as Counsel says, June, 1950.

The Court: How did you find out that that was their theory? Not from the complaint.

Mr. Biggs: Well, that was the theory upon which it was—I guess I will have to back up there. Mr. Strayer was handling it. Wasn't it submitted on a motion for summary judgment?

The Court: Well, it says——

Mr. Biggs: Isn't the time limited? Don't they limit it to June, '54, your Honor?

The Court: From July 1, '54, to December 21st, 1955.

Mr. Biggs: That's the way to find out. They limited their claim to timber that had been removed only after July, 1954, which they say—which they said then by deposition, I guess, was based upon the five-year period.

The Court: Well, I will take a look at that if I can find it.

You say that there is a three- or two-year statute of limitations with reference to penalty? [36]

Mr. Biggs: Three-year statute of limitations with respect to the treble damages, your Honor.

The Court: Is the case which Mr. Dezendorf refers to, that Kinzua Lumber Company case, in point?

Mr. Biggs: I don't think completely in point. They passed then only on the double-damage feature, your Honor. And they held there that double damages were not punitive because it did not require a showing of wilful damage.

The Court: So, as far as——

Mr. Biggs: But by inference, then, suggested that the treble damage would be because it's recoverable only upon proof of wilful misconduct of the trespasser.

Mr. Dezendorf: I disagree with his construction of the case.

The Court: In any event, you concede that if you are liable you would be liable for double damages?

Mr. Biggs: I will not here, your Honor. No. I am not, because of the consent theory, I think.

The Court: Oh, yes.

Mr. Biggs: Yes. If it is a trespass, if it is a direct trespass not consented to and on which there is no estoppel on his part to invoke any double damages, then I would say it is double damages.

The Court: All right.

Mr. Biggs: That would be true. [37]

The Court: All right.

Call your first witness.

Mr. Dezendorf: Well, I think there is one matter that we, perhaps, can do quickly which may shorten our proof a lot. I have only had a chance to briefly discuss this.

Mr. Biggs, it is my understanding—and you correct me if I am wrong—that you are now willing to stipulate to the material which was in Paragraphs 10 and 11 of the pretrial order as I submitted it?

Mr. Biggs: Let me just check this one minute. It will just take a minute, your Honor.

(Discussion held off record.)

I will stipulate, if the Court please, that if Counsel called a witness who was qualified to testify on the subject he would testify that the values—reasonable market values of timber of the species and kind set out in the table which is to be dictated would be the amount set opposite those units.

Mr. Dezendorf: May I make a suggestion that we include this paragraph as another admitted fact in the pretrial order?

(Discussion held off record.)

This is the table involved: Heading, Description with the Years 1950, '51, '52, '53, '54, '55, the descriptions being Old-Growth Douglas Fir: 15, 19, 24 29, 30 and 30. Second-Growth Douglas Fir: 5, 9, 14, 19, 24, 25-30. Hemlock: [38] 1, 2, 3, 4, 5 5. Cedar only under 1953: 5. Could I have one more moment?

(Discussion held off record.)

Call Mr. Seaver. Will you step forward and be sworn Mr. Seaver? [39]

JOHN N. SEAVER, JR.

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Dezendorf:

Q. Mr. Seaver, where do you live?

A. I live in Florence.

Q. How long have you lived in Florence?

A. I lived in Florence since 1950.

Q. Where did you live prior to that?

A. In the Mapleton area.

Q. Now, can you just tell us generally about how far the real property involved here is from the City of Mapleton?

A. Approximately ten miles.

Q. Now, is that by airline?

A. No; I think that's road.

Q. How far would it be airline, do you know, approximately? A. Six or seven, perhaps.

Q. Is it southeast of Mapleton?

A. Generally south, yes.

The Court: Do you have a map of that?

Mr. Biggs: Yes. Your Honor, may I suggest this? I think it might be appropriate as even part of the opening statement, we have a stereoscopic map

(Testimony of John N. Seaver, Jr.)

with the equipment here to show it. And I think it would be worth while for your Honor actually [40] to examine the map under stereoscopic slide and you could use another map there, a flat map, to orient yourself.

Mr. Dezendorf: Of course, I have never seen it.

Mr. Biggs: I didn't have a chance to get it in my exhibits.

The Court: Let me see a flat map. Have you got a flat map?

Mr. Biggs: There is a flat map. Here is a color map. This is the vicinity map. Mark that Defendant's Exhibit.

The Court: He doesn't have to mark it yet.

Mr. Biggs: That's a vicinity map.

The Court: Show me where this Mapleton area is. Here is Florence. Mapleton is right here. Now, where is the tract of land? Is it in Township 31, part of it?

Mr. Biggs: It's Section 31.

The Court: Section 31?

Mr. Dezendorf: And Section 6 right below.

The Court: Yes.

Mr. Biggs: A little of it in Section 1, I believe.

The Court: And it is in the Siuslaw National Forest. All right. Go ahead.

Q. (By Mr. Dezendorf): Mr. Seaver, when did you first actually go upon the property that we are discussing here today?

A. I believe I was there in about 1942-1.

(Testimony of John N. Seaver, Jr.)

Q. Was that at the time the Warlicks [41] owned it? A. Yes.

Q. Did you know the Warlicks? A. Yes.

Q. What kind of a road was there in there to the place at that time, if any?

A. Practically no road.

Q. How did you get it?

A. Went in by the way of Sweet Creek over a County and Forest Service combination road about 20 miles.

Q. So, in order to go the four or five airline miles you had to go some 20 miles to get there, is that right? A. Yes.

Q. Would an ordinary automobile go over the road that you went in on?

A. Not the ones they have now, no.

Q. What kind of a car did you go in in?

A. Well, I don't remember if we went with Mr. Warlick. I believe we did. And he had an old car that he kept just for going to the ranch.

Q. Did it have big wheels on it?

A. Yes. It was an old model Buick with big high wheels.

Q. Now, do you know of your own knowledge when it was that a road was built into that property which was suitable for logging purposes?

A. Yes. [42]

Q. When was that? A. About 1949.

Q. Up to that time there was no read in there that could have been used to log the timber out, is that correct? A. I don't think so.

(Testimony of John N. Seaver, Jr.)

Q. Now, when did you first occupy the Warlick property for any purposes?

A. I believe it was 1947—or early '47, or, perhaps, it could have been '48. For pasture, I rented it.

Q. And you ran cattle or sheep there?

A. I had cattle on it, yes.

Q. And you think that was '47 or '48?

A. Yes.

Q. And was that continuous thereafter?

A. Yes; it has been.

Q. So that you had some cattle on there from '47 or '48 up through the time that you actually acquired title to the property, is that right?

A. Yes.

Q. Now, I take it that there isn't any dispute here that the logging started in '49—is that your recollection—on your property? A. Yes.

Q. What is now your property. Is it your recollection that they logged there in 1950, also? [43]

A. Yes.

Q. How much did they take out in 1950 as compared to '49?

A. Well, very little in '49. But it was——

Q. How much, relatively speaking, in 1950?

A. I don't know the exact footage, but it would many, many times over what '49 was.

Q. To your recollection was there any logging in '51?

A. I can't connect it with anything that would give me that date, no.

(Testimony of John N. Seaver, Jr.)

Q. What about '52?

A. I don't know of anything that would connect that date as being—logging going on there.

Q. In '53 was there logging there?

A. Yes; I remember that.

Q. What about '54?

A. No. I think the strike pretty well had them stopped in '54.

Q. What about '55?

A. There was some in '55.

Q. Now, I believe the contract that the defendant pleads in its answer between yourself and United States Plywood was dated August 19th, 1955. When was that contract actually signed?

A. Well, it was late in the fall. I am not sure of the exact date. I know—I know I didn't sign it when they had it, or didn't say something about it, or something. [44]

Q. Mr. Seaver, when did you first find out that you had a claim against the defendant or its predecessor for taking timber from this property to which they were not entitled?

A. That was in early spring of 1956.

Q. How did you find it out then?

A. I went to Mr. Hoffman and talked to him.

Q. He is the Mr. Hoffman who is your attorney in this case?

A. My attorney, yes.

Q. Did you remove any timber from the property involved after Mr. Hoffman gave you that advice?

A. No.

Q. Did you complain about the timber that had

(Testimony of John N. Seaver, Jr.)

been removed shortly after that advice was given you by Mr. Hoffman?

A. Yes. Mr. Hoffman took care of that.

Q. And he is the one that complained for you?

A. Yes.

Mr. Dezendorf: I will offer at this time Exhibit 2, which is the assignment.

Mr. Biggs: No objection.

The Court: Admitted.

(At this point a three-page document entitled Assignment, dated November 16, 1956, was marked for Identification as Plaintiff's Exhibit No. 2.)

Mr. Dezendorf: I will offer Exhibit 1, which is the [45] Warlick contract.

Mr. Biggs: No objection.

The Court: Admitted.

(At this point a six-page document, Agreement, dated 4th of May, 1942, was marked for Identification as Plaintiff's Exhibit 1.)

Mr. Dezendorf: I will offer Exhibit 6, which are the stubs on the checks he received from U. S. Plywood.

The Court: Admitted. Now, I will tell you what I will do.

Mr. Biggs: I think, your Honor, I didn't notice on the pretrial order the objections in the conference we had in your—there are some of them I had

(Testimony of John N. Seaver, Jr.)

marked objections to. And I don't believe I marked them on there.

The Court: Now, I notice the plaintiff's exhibits go from 1 to 32. How many are you offering?

Mr. Dezendorf: Well, let's see. We have got some checks here. Some of them are going to be blank numbers, it turns out, because we combined——

The Court: But let's take 1 to 32 first.

Mr. Dezendorf: Well, out of that 10 and 11 are combined with 14. So 10 and 11 are blank as such.

The Court: All right. I am going to go down—you read. I suggest it be done this way: You say 1 and find out if there is any objection. If there is no objection, they are [46] admitted automatically.

Mr. Dezendorf: All right. I will offer Exhibit 1.

Mr. Biggs: No objection; 2, no objection.

Mr. Dezendorf: 3, which is the map over there by the——

Mr. Biggs: No objection.

(At this point Plaintiff's Exhibit 3, an aerial photograph, was received in evidence.)

Mr. Dezendorf: 4, which is the timber removal affidavit.

Mr. Biggs: Object to relevancy and competency.

The Court: Your objection will be overruled. It may be admitted.

(At this point Plaintiff's Exhibit 4, affidavit of Timber Removal, was received in evidence.)'

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: 5, which are the conservation harvest permits.

Mr. Biggs: No objection.

Mr. Dezendorf: 6, I guess, are the stubs which you just——

Mr. Biggs: The only thing about 5, the only question I raised was I don't think you have all of them there. But we will follow that up.

Mr. Dezendorf: 6, is it?

Mr. Biggs: No objection. [47]

Mr. Dezendorf: 7.

Mr. Biggs: My objection is that is the material that is put on there. I would presume it's argumentative, your Honor, and it contains data which we dispute. So that part of the map we object to.

The Court: Will you have testimony to connect that up?

Mr. Dezendorf: That's right. It is the testimony—it will be the testimony of Mr. Jones as to the amount.

The Court: All right. We will delay that one.

Mr. Dezendorf: All right. Then, 8. I don't think you have any objection to that.

Mr. Biggs: Well, for the same reason, if the dates on which you say those areas are logged off——

Mr. Dezendorf: I should explain this one. This just has on it the dates of timber removal affidavits which are already in evidence to show them by area.

(Testimony of John N. Seaver, Jr.)

The Court: All right. The objection is overruled and I am going to permit it to come in.

(At this point Plaintiff's Exhibit 8, Map showing logging dates taken from affidavits, was received in evidence.)

Mr. Biggs: All right. Except that—that's all right, your Honor, as long as it's understood that it says logged between such and such a date.

Mr. Dezendorf: As shown by the affidavits. It's just [48] taken from the affidavits.

Mr. Biggs: It's only argumentative. Go ahead.

Mr. Dezendorf: 9.

The Court: Its relevancy is related to the timber removal affidavit and it's merely to clarify the timber removal affidavit.

Mr. Dezendorf: It's so shown where they fit on the map.

The Court: All right.

Mr. Biggs: By their theory, your Honor.

The Court: Well, that's right.

Mr. Biggs: Yes.

Mr. Dezendorf: All right, 9.

Mr. Biggs: What is that?

The Court: 9 is the same thing. It's their theory of where they have logged after the timber affidavits——

Mr. Dezendorf: That's correct.

The Court: Now, I think I am going to admit that also because—perhaps I should state here now

(Testimony of John N. Seaver, Jr.)

that I think the timber removal affidavits are admissible as an admission against interest——

Mr. Biggs: Yes.

The Court: ——by a person who was charged with responsibility of doing it unless you come forward and show that he didn't have the authority.

Mr. Dezendorf: Well, I think the Court should have in [49] mind, too, the specific provision of the contract involved which is quoted in Paragraph 3 of the pretrial order and the admitted facts which reads as follows:

“That Siuslaw should pay ‘any and all taxes and fire patrol assessments or other assessments, if any there be, lawfully levied and assessed against said timber (exclusive of the land) commencing with the 1942-1943 taxes throughout the life of this agreement and until the timber purchased and sold hereunder shall have been cut and removed or the same abandoned * * *’”——

The Court: Yes.

Mr. Dezendorf: ——“* * * by Siuslaw.”

The Court: Well, I don't think that adds anything to it.

Mr. Biggs: No.

The Court: But that's my view.

Mr. Dezendorf: 12.

Mr. Biggs: I have no objection except as to the relevancy. I presume that they are all—I don't know the dates or the times of them, but I don't question their authenticity. They are some parts of the property.

(Testimony of John N. Seaver, Jr.)

The Court: Can you tell us what date they were taken?

Mr. Hoffman: Your Honor, they were taken about a month or two ago in Mr. Seaver's [50] presence.

The Court: All right.

Mr. Dezendorf: Well, I take it we don't offer the depositions as such; 14 are the cruiser's charts, which includes what was formerly marked 10 and 11.

Mr. Biggs: If your Honor doesn't object, I would like to have that passed over for this reason: It contains many documents, some of which are put in only——

The Court: I miss the Rule.

Mr. Biggs: I haven't had a chance to study them.

The Court: It is perfectly all right. I am not urging you to consent to anything. I just want to know the exhibits to which you do consent.

Mr. Biggs: I think there will not be after we have had a chance to see them——

Mr. Dezendorf: 15.

Mr. Biggs: That's the same thing, isn't it?

The Court: All right.

Mr. Biggs: Things that the cruiser may want to refer to but may not want to?

Mr. Dezendorf: That's right.

Mr. Biggs: Log-scaling rules.

Mr. Dezendorf: 16.

Mr. Biggs: We admit their authenticity. We

(Testimony of John N. Seaver, Jr.)

object to their relevancy. At least, we don't see the relevancy.

The Court: What do you claim for them? [51]

Mr. Dezendorf: As long as he has now admitted the prices, it's conceivable we may not need them, although if we get into argument about dimension of timber they will be——

The Court: All right. I am going to withhold judgment on that one.

Mr. Dezendorf: 17.

Mr. Biggs: That's—on the relevancy I object to that. It came from our files. We see no relevancy to it. But it was written prior to the logging operation here. But if you want to put it in, why——

Mr. Dezendorf: We do. We think it's relevant. It shows there wasn't any way to get timber out.

Mr. Biggs: We admit that we got the road up there. Until we got the road up there it was inaccessible, of course.

Mr. Dezendorf: 18, which is defendant's timber—and I have inserted this to conform to the deposition description of the inventory and depletion records.

The Court: Any objection?

Mr. Biggs: No objection.

The Court: Admitted.

(At this point Plaintiff's Exhibits 18-A and 18-B, Timber Inventory and Depletion records of defendant, were received in evidence.)

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: Will the Court mind making that insert on [52] the original?

The Court: It's already done.

Mr. Dezendorf: 19, they haven't as yet conceded for my use. 20 are the two big maps that are here.

Mr. Biggs: No objection.

The Court: All right.

(At this point Plaintiff's Exhibit 20, Defendant's Timber Maps, were received in evidence.)

Mr. Dezendorf: 30.

Mr. Biggs: 30 or 21?

Mr. Dezendorf: 30.

The Court: You are not offering 21 to 30?

Mr. Dezendorf: They were things that I expected them to supply me with, which hasn't been done.

The Court: All right.

Mr. Dezendorf: And I am not making very much noise about it now because I am not so sure they are too relevant at the moment; 30, of course, is a sealed exhibit that wouldn't go in now, anyhow. 31?

Mr. Biggs: That's the Lane County road map?

Mr. Dezendorf: Yes.

The Court: Admitted.

(At this point Plaintiff's Exhibit 31, Map of Lane County Market Roads, [53] was received in evidence.)

(Testimony of John N. Seaver, Jr.)

Mr. Dezendorf: 32 are the Forest Service records that are being copied so they are not available at the moment.

The Court: All right. What have you got?

Mr. Biggs: Well, we haven't had a chance to get ours displayed here.

Mr. Dezendorf: I haven't seen his yet.

The Court: That's all right. I am not going to see them either for awhile.

Mr. Dezendorf: I might say for whatever benefit it has, I have here and ask the Court to take judicial knowledge of the definition of merchantable as contained in Webster's New International Dictionary, Second Edition Unabridged, which I noted the other day is the same one you have in your chambers which is the one we have in our office.

The Court: And my dictionary is at least 100 years old, or it looks like it.

Mr. Dezendorf: Here is a copy for you. Would you hand that to the Court, please?

The Court: I want to see that as between the Oregon Supreme Court and Webster's International Dictionary. I think I am more bound by the Supreme Court of Oregon with all their shortcomings.

(At this point except as indicated by the parentheticals concerning receipt of [54] documents, all exhibits were received in accordance with the Court's remark prior to the discussion concerning Plaintiff's Exhibits.)

(Testimony of John N. Seaver, Jr.)

Cross-Examination

By Mr. Biggs:

Q. You say that you were in Florence since 1950? A. That's my main interest, yes.

Q. But you were back and forth in this Mapleton area during all of those years, were you not?

A. Yes.

Q. Actually, you were logging, doing some logging on the Warlick tract or Tucker tract during those years, weren't you?

A. One time, yes.

Q. Just one time? A. Yes.

Q. What time was that?

A. Late in the fall of 1955.

Q. Who were you working for then? Was that the time that you were working for yourself?

A. Yes.

Q. When you had a contract with the United States Plywood? A. Yes.

Q. Well, weren't you working for Siuslaw Logging Company when [55] they were logging on the Warlick tract? A. Not that I know of.

Q. Did you ever work for them as a logger?

A. No.

Q. Oh. You did not? A. No.

Q. I understood you in your deposition to say that you had. Had you ever done any logging for any of the—employed by any of the logging contractors who were taking timber off of the Warlick property? A. Yes.

(Testimony of John N. Seaver, Jr.)

Q. When? A. 1949.

Q. For Kontich Logging Company?

A. Yes.

Q. Is that the only time? A. Yes.

Q. The Kontich Logging Company and the time that you had a contract of your own; and those are the only two logging operators that you worked for or the only logging you did on that tract?

A. I am afraid I don't understand what you mean. You get too much in one question.

Q. Well, you know what logging means, and you have worked for logging companies, have you not? [56] A. Yes.

The Court: I think the difficulty is that he says he worked for the company but he hasn't admitted that he worked in '49 on this particular tract.

Mr. Biggs: I see.

Q. Did you work on the Seaver tract in 1949?

A. Yes.

Q. By the Seaver tract we are talking about this tract (indicating)? A. Yes.

Q. Now, did you do any logging for yourself or anybody else on the Seaver tract between 1949 and 1955? A. No.

Q. What were you doing during those years, then? A. '49 to '55?

Q. Yes, sir.

A. Since 1950, I been self-employed.

Q. Well, I mean, what kind of work have you been doing? A. Logging, primarily.

(Testimony of John N. Seaver, Jr.)

Q. Logging. In that area, in the Mapleton area, or closer to Florence, or where?

A. Closer to Florence; although it's been in the Mapleton area.

Q. I had understood that you had worked for the Siuslaw Logging Company when they were logging the Seaver tract? [57] A. No.

Q. When you bought this property from Mr. Tucker, what did you pay for it? A. \$6,500.

Q. That figured roughly about \$16 an acre, is that correct?

A. I have never figured it out that way.

Q. Yes. There are 414 acres on the property, are there not?

A. That isn't the figure that the deed calls for.

Q. Pardon?

A. That isn't the figure that the deed calls for.

Q. Well, how much does the deed call for?

A. 413, I believe.

Q. All right. 413 acres. And you paid \$6,500 for it. You bought that from Mr. Warlick?

A. No.

Q. Not Mr. Warlick, Mr. Tucker.

A. Yes.

Q. At the time you bought that you assumed you were buying only the land; you didn't assume that you were buying any timber on that, isn't that correct? A. That's correct.

Q. Yes. Mr. Tucker didn't represent that you were getting any timber and you didn't think you were getting any timber, isn't that correct?

(Testimony of John N. Seaver, Jr.)

A. Yes. [58]

Q. Then when you subsequently obtained an assignment from Mr. Tucker of whatever rights he might have against U. S. Plywood, you solicited that assignment, did you not?

A. I asked for it, yes.

Q. You went down to see Mr. Tucker, did you not?

A. Yes.

Q. He lives in California? A. Yes.

Q. You told him that you wanted it to include with the claim that you were bringing against them in the Federal Court in Portland, is that correct?

A. I don't remember the exact words I told him when I asked him to assign that.

Q. Did you pay him any consideration at all for it?

A. No.

Q. He didn't say to you that he thought he had any rights against U. S. Plywood, did he?

A. He was surprised that they were still in the area.

Q. Yes. He didn't say to you that he thought they had ever taken off any timber that they were not entitled to take off, did he?

A. We didn't discuss the timber they took off, I don't believe.

Q. Well, the point is he didn't consider that he had a claim against U. S. Plywood on account of the timber that had been [59] taken off of that property; isn't that correct, Mr. Seaver?

A. He felt that when he sold it to me that any rights or any contract went with the property.

(Testimony of John N. Seaver, Jr.)

Q. Well, that isn't quite the question I asked you. Did he not tell you in so many words that he didn't regard himself as having any rights against U. S. Plywood?

A. I am afraid I don't follow what you—what you want me to say, what you are after.

Mr. Biggs: Would you read the question? I mean to be co-operative.

(At this point Mr. Biggs' last question to the witness was read by the Court Reporter.)

The Witness: His rights—I don't think his rights were brought up. I didn't talk with him about his rights.

Q. (By Mr. Biggs): Well, that's what you were obtaining from him, an assignment of his rights, weren't you?

A. He felt the contract went with the property, he told me. He says, "Whatever was there," he says, "I have sold it all to you." He says, "It's all yours." That's what he told me.

Q. Yes. But what you were talking about was some right of action that he had acquired against U. S. Plywood before you bought the property; isn't that what you understood the assignment to be?

A. Well, I understood the assignment was just giving me his [60] interest that he might have held beforehand, yes.

Q. All right. Well, the question, then, was did

(Testimony of John N. Seaver, Jr.)

he tell you that he felt that he had a claim against U. S. Plywood?

A. I am afraid—I don't think he—we didn't talk about if he had any claims or anything against them.

Q. Did he ask you what you wanted the assignment for? A. Yes.

Q. What did you tell him?

A. I told him that my attorney advised me to get the assignment from him.

Q. Yes. And you didn't know what the assignment meant?

A. Well, I knew it pertained to the timber contract.

Q. Well, did he read the assignment?

A. Yes.

Q. Do you remember when your deposition was taken in your attorney's office very recently, Mr. Seaver? A. Yes.

Q. I was doing the examining. I asked you this question——

Mr. Dezendorf: What page?

Mr. Biggs: On Page 31. "Relating to the assignment"—I will just give you two or three questions in advance here so that you will get the background.

"Q. Did he say, in effect, to you * * *"—and I am referring now to your conversation with Mr. Tucker—" * * * that he didn't feel that he had any rights [61] there that he could charge you for?

(Testimony of John N. Seaver, Jr.)

“A. Well, he felt when I bought the place that everything went with it.

“Q. Everything that was on the place then went with it, and any right he might have went with it?

“A. Yes; he was glad to give me it.

“Q. Did he tell you that he felt he had any right?”

Your answer: “No, he didn’t feel like he had any.”

Do you remember those questions being asked you and those answers given? A. Yes.

Mr. Biggs: Yes.

The Court: Is that correct?

The Witness: Yes.

The Court: Those answers are correct?

The Witness: Yes.

Mr. Biggs: Yes.

Q. Mr. Seaver, you discussed with Mr. Hoffman your rights under the contract as against U. S. Plywood shortly after you bought the property in 1952, did you not?

A. I don’t remember going into detail on it, no.

Q. Well, didn’t you take the contract in to him at that time and ask him to go over it and tell you what your rights were with respect to it? [62]

A. He handled the paper work when I bought it.

Q. Well, did he have the contract?

A. Yes.

Q. I am speaking now of the copy of the contract from Warlick to Siuslaw Forest Products.

A. Yes.

Q. He had a copy of that?

(Testimony of John N. Seaver, Jr.)

A. I believe he did.

Q. You consulted him with respect to your rights under that contract, is that correct?

A. Yes.

Q. That was in 1952? A. Yes.

Q. Now, at that time had most of the timber been taken according to your recollection—had been taken off the property; is that what you said a moment ago? A. I believe so, yes.

Q. Yes. Did he advise you or did you at that time ask him for advice as to whether you had any rights against U. S. Plywood because of timber that they might have unlawfully removed from your premises?

A. I don't believe I asked him that.

Q. Yes. He looked over the contract, however?

A. Yes. He must have read it.

Q. And you knew at that time the type of timber that had [63] been taken off and how much had been taken off, approximately?

A. Well, it would have just been a guess. I didn't know how much. It would have been a guess.

Q. Did you read the letter that he wrote following that conference?

A. I expect I had a copy of it. I read it.

Q. I will ask you——

This isn't marked, your Honor. It's listed.

The Court: All right. Mark it.

Mr. Biggs: What is the defendant's Exhibit, Mr. Husband?

(Testimony of John N. Seaver, Jr.)

Mr. Husband: That will be Defendant's Exhibit 72 under your numbers. Are you beginning with 50?

The Clerk: Yes.

The Court: Have you got another letter that you want to show to him?

Mr. Biggs: Yes. And 73.

(At this point a letter dated October 13, 1952, from Lewis Hoffman to Siuslaw Forest Products, Inc., was marked for Identification as Defendant's Exhibit 72.)

(At this point a letter dated March 14, 1956, from Mr. Lewis Hoffman to United States Plywood Corporation was marked for Identification as Defendant's Exhibit 73.) [64]

The Court: All right, Mr. Biggs. He is ready.

Mr. Biggs: Yes.

Q. Have you read both letters?

The Court: No.

Mr. Biggs: All right. The first letter is 72.

Q. Was that written in your behalf?

A. Yes.

Q. Following your conversation? A. Yes.

Mr. Biggs: We will offer that in evidence, if the Court please.

Mr. Dezendorf: I have not seen it, your Honor.

The Court: All right. Now, show him the letter, 73.

Mr. Biggs: Mark this for identification 68 and 69.

(Testimony of John N. Seaver, Jr.)

A. I believe he did.

Q. You consulted him with respect to your rights under that contract, is that correct?

A. Yes.

Q. That was in 1952? A. Yes.

Q. Now, at that time had most of the timber been taken according to your recollection—had been taken off the property; is that what you said a moment ago? A. I believe so, yes.

Q. Yes. Did he advise you or did you at that time ask him for advice as to whether you had any rights against U. S. Plywood because of timber that they might have unlawfully removed from your premises?

A. I don't believe I asked him that.

Q. Yes. He looked over the contract, however?

A. Yes. He must have read it.

Q. And you knew at that time the type of timber that had [63] been taken off and how much had been taken off, approximately?

A. Well, it would have just been a guess. I didn't know how much. It would have been a guess.

Q. Did you read the letter that he wrote following that conference?

A. I expect I had a copy of it. I read it.

Q. I will ask you——

This isn't marked, your Honor. It's listed.

The Court: All right. Mark it.

Mr. Biggs: What is the defendant's Exhibit, Mr. Husband?

(Testimony of John N. Seaver, Jr.)

Mr. Husband: That will be Defendant's Exhibit 72 under your numbers. Are you beginning with 50?

The Clerk: Yes.

The Court: Have you got another letter that you want to show to him?

Mr. Biggs: Yes. And 73.

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The Court: All right, Mr. Biggs. He is ready.

Mr. Biggs: Yes.

Q. Have you read both letters?

The Court: No.

Mr. Biggs: All right. The first letter is 72.

Q. Was that written in your behalf?

A. Yes.

Q. Following your conversation? A. Yes.

Mr. Biggs: We will offer that in evidence, if the Court please.

Mr. Dezendorf: I have not seen it, your Honor.

The Court: All right. Now, show him the letter, 73.

Mr. Biggs: Mark this for identification 68 and 69.

(Testimony of John N. Seaver, Jr.)

(At this point a four-page document entitled Logging Contract was marked for Identification as Defendant's Exhibit 68.)

(At this point a letter dated December 5, 1955, from United States Plywood Corporation, Mapleton Division, to Mr. John N. Seaver, Jr., was marked for Identification as Defendant's Exhibit 69.)

Mr. Dezendorf: No objection to 72.

The Court: It will be admitted.

(At this point a letter dated October 13, [65] 1952, from Lewis Hoffman to Siuslaw Forest Products, Inc., previously marked for Identification, was thereupon received in evidence as Defendant's Exhibit 72.)

The Court: All right. Give it to him.

Q. (By Mr. Biggs): That was a copy of a letter also written in your behalf? A. Yes.

Q. Following a conversation that you had with him prior to the——

Mr. Dezendorf: We know about that.

Q. (By Mr. Biggs): ——filing of the lawsuit?

Mr. Dezendorf: No objection.

The Court: No objection? Admitted, 73.

(At this point the letter dated March 14, 1956, from Lewis Hoffman to U. S. Plywood Corporation, previously marked for Identification, was received in evidence as Defendant's Exhibit 73.)

(Testimony of John N. Seaver, Jr.)

Q. (By Mr. Biggs): I ask you to examine the Defendant's Exhibit 68. Is that a copy of the contract, Mr. Seaver, that you entered into with U. S. Plywood? A. I believe it is. I haven't—

Q. A photostatic copy. I won't ask you to read all the other if you will just verify the signature there. [66] A. Looks like my signature.

Mr. Biggs: Yes. We offer that in evidence, if the Court please.

Mr. Dezendorf: We object to it for the reason and upon the ground that under the witness' testimony it was not actually entered into until December of 1955 after the operative facts had occurred which are the subject matter of this proceeding. In addition, there is not a basis for an estoppel, so that it is immaterial.

Mr. Biggs: Yes.

The Court: Is it true that this contract was entered into subsequent to the removal of the 488,000 feet of timber in 1955?

Mr. Biggs: No. I think whatever the stipulated figures are there includes the amount that he removed, your Honor. That is according to our information.

Mr. Dezendorf: That's not ours.

Mr. Biggs: But the point that I offer this for at this time is not only to show estoppel and consent; it's to show by the recitals in the contract an acquiescence in the fact U. S. Plywood owned that timber.

The Court: I am going to overrule the objection. It will be admitted.

(Testimony of John N. Seaver, Jr.)

(At this point the document entitled Logging Contract, previously marked for Identification, was received in [67] evidence as Defendant's Exhibit 68.)

The Court: I would like to find out from the witness about the events leading up to the execution of the contract. Will you go into that?

Mr. Biggs: I will if I can just finish this one other document, your Honor.

Q. After the contract had been entered into you applied for an extension of time under that contract to complete your logging, did you not, Mr. Seaver?

A. Late in the season we talked about it, yes.

Q. As a matter of fact, the contract carried a penalty clause imposing some penalty on you if you didn't bring in all the logs that you felled, isn't that correct?

A. Yes.

Q. It specified the size of the logs which you should bring, isn't that correct?

A. I don't remember. I didn't read——

Q. It defined merchantability within the contract?

A. I didn't read it. I don't remember.

Q. Now, is the document that you have in your hand and marked for Identification 69 the extension that was granted to you by U. S. Plywood to permit you to perform your contract?

A. I expect it is.

(Testimony of John N. Seaver, Jr.)

Q. Well, you received the original of that, of which that's a copy, did you not? [68]

A. I believe I did.

Mr. Biggs: We offer that in evidence.

The Court: What is the date? What is the date on it?

Mr. Biggs: December, 1955.

Q. Giving you until August, 1956, isn't that correct?

Mr. Dezendorf: Same objection.

The Court: Fine. Your objection is overruled.

Mr. Biggs: Yes.

(At this point the letter dated December 5, 1955, from U. S. Plywood Corporation, Mapleton Division, to Mr. John N. Seaver, Jr., previously marked for Identification, was thereupon received in evidence as Defendant's Exhibit 69.)

Q. (By Mr. Biggs): Now, when did you negotiate with U. S. Plywood for that contract, Mr. Seaver? When did you request the opportunity to do logging on your place from U. S. Plywood?

A. When I talked to U. S. Plywood about logging it wasn't—my place was just one of several places over there.

Q. Well, when was it?

A. In the summer of 1955.

Q. In the summer of 1955? A. Yes.

Q. You wanted to start logging for them, is that correct? A. Yes. [69]

(Testimony of John N. Seaver, Jr.)

Q. Now, what logging did you do under that contract?

A. Well, I logged the right of way for them. That wasn't on this place at all——

Q. No. I say under that contract. Under the contract of August, 1955, what logging did you perform?

A. Well, I logged about 100,000 off of my property.

Q. When?

A. I believe I started in December, 1955.

Q. You mean from August to December you didn't perform under this contract?

A. I was working on some other timber of theirs.

Q. What other timber?

A. Well, it was a road right of way about two and a half miles from there that they wanted removed.

Q. You mean for the U. S. Plywood?

A. Yes.

Q. I see. So that some time in December you cut and removed 108,000 feet; December, 1955?

A. A little over a hundred thousand. I don't know the exact figure.

Q. All right. Then did you resume logging after December, 1955?

A. No; not for them.

Q. Isn't it a fact that you felled a considerable number of trees which you did not remove but which were still on your [70] place under that contract?

A. Yes.

(Testimony of John N. Seaver, Jr.)

Q. When did you do that?

A. I don't know the exact date.

Q. Well, it was after December of '55, was it not?

A. No; it was not.

Q. Why didn't you haul those logs in and deliver them with the logs that you delivered in December of '55?

A. I logged—I felled that timber in the late summer of '55 between—oh, I don't know what the reason was. We were falling to keep busy. And after December, 1955, is when I went to talk to Mr. Hoffman, regards this contract.

Q. Well, just a minute. What you said a moment ago is not correct, then, that you didn't start performance under that contract until December of '55. You started falling out there in August of '55?

A. I don't know what month it was. We did fall some timber over there, yes.

Q. How much did you fall that you didn't bring in?

A. I don't know.

Q. Well, haven't you any estimate? You know you delivered 108,000 feet. Now, how much more did you fall?

A. I didn't pay for it to be felled by the thousand. And the only way I have is—to get a figure on a scale is when it's loaded out. [71]

Q. Well, did you fall more than you delivered or less than you delivered?

A. No; I think probably less.

Q. A great deal less or just a little less?

(Testimony of John N. Seaver, Jr.)

A. A little less, perhaps. I don't know exactly.

Q. It would be in the neighborhood of 100,000 feet? A. Perhaps 75,000.

The Court: Who did the felling?

The Witness: Fellows I had hired working by the hour.

The Court: You paid them by the hour?

A. Yes.

The Court: So you didn't have to measure it?

The Witness: No.

Q. (By Mr. Biggs): Now, Mr. Seaver, you went to see Mr. Hoffman again, you say, some time in the spring of 1955? A. -6.

Q. 1956? A. Yes.

Q. The lawsuit that Mr. Hoffman was authorized to start for you, this lawsuit, this trespass case, was based upon your claim and his advice to you, wasn't it, that the U. S. Plywood was trespassing because they had not completed their logging operations within five years after they started; isn't that correct? A. Yes. [72]

Q. He didn't, then, advise you and you didn't request advice or didn't assume that you had any right for damages against U. S. Plywood because of the removal of any non-merchantable trees, did you?

Mr. Dezendorf: If the Court please, I would have to object to that. This case started out as a trespass case and it still is a trespass case.

The Court: I don't know what the relevancy would be, anyway. Suppose this man didn't know

(Testimony of John N. Seaver, Jr.)

all of his right? Does it mean that he can't assert them now?

Mr. Biggs: No, your Honor; not at all. I just simply want to show that until the amended complaint was filed here nobody who had any connection with this tract of timber from——

The Court: He got a new lawyer.

Mr. Biggs: ——until the last man ever thought that there was any right in U. S. Plywood to take the timber off that place and U. S. Plywood doesn't think yet——

The Court: Well, but, I can't see the relevancy of it.

Mr. Biggs: Acquiescence in the subsequent conduct of the parties, your Honor, is stressed in the Hughes-Heppner case and in the Harris Pines case.

The Court: Oh, I think there is a little difference.

Mr. Biggs: As bearing upon the construction of the contract?

The Court: Yes. Yes. How the parties deal with each [73] other and view that contract during its performance is evidence of what the parties meant.

Mr. Biggs: Yes, sir.

The Court: But in this particular case Mr. Seaver never drew the contract. He was never a party to the Warlick contract with Siuslaw Logging Company or Forest Products Company and you are asking him about conversations which he

(Testimony of John N. Seaver, Jr.)

had with his lawyer long after any timber had been removed.

Mr. Biggs: No. They were still, I think, performing the contract.

The Court: No.

Mr. Dezendorf: No.

Mr. Biggs: What?

The Court: That was in the spring of 1956.

Mr. Biggs: '56.

The Court: And the last timber that was removed was in December, 1955.

Mr. Biggs: '55. '55. That may very well be. Of course, we think, your Honor, just to make our position straight there, that he was a privy to the contract because his title derives from Warlick like our title derives from Warlick through main conveyances and with knowledge on the part of him and his predecessors as to what the——

The Court: You don't have to prove it. I think that's part of the plaintiff's proof. It was Mr. Dezendorf who said [74] that this man is not estopped because he never knew what his rights were. So they didn't contend that he knew that he had those rights which he is now contending for.

Q. (By Mr. Biggs): Did you ever make any objection at any time that you owned property—to the removal of any of this timber from the property, Mr. Seaver?

A. Not till Mr. Hoffman wrote them a letter.

Q. Well, which letter are you talking about?

A. Well, I expect it was in the spring of '56.

(Testimony of John N. Seaver, Jr.)

Q. In 1956. That's the first and only objection you ever made? A. Yes.

Q. During the years after you acquired the property, did you regularly apply to the U. S. Plywood offices for reimbursement for the timber taxes? A. Yes. Not regularly, but I——

Q. Well, you annually obtained reimbursement for the fire patrol assessments which were charged against your land and you asked them also to allocate some part of general taxes to the timber and pay that, did you not?

A. I think it was a timber tax. I don't know. The contract tells what it was.

Mr. Biggs: Yes.

The Court: Is there any dispute about that particular issue? [75]

Mr. Dezendorf: No.

The Court: There is no controversy, Mr. Biggs.

Mr. Biggs: All right. I will offer these.

Mr. Dezendorf: The amounts are small. It might be of interest to the Court to see what they were.

The Court: You admit it?

Mr. Biggs: We will have it marked for identification—four—six checks.

Mr. Dezendorf: They may be admitted as far as we are concerned.

Mr. Biggs: All right.

The Court: Admitted.

(At this point copies of four checks to John Seaver in payment of timber taxes on prop-

(Testimony of John N. Seaver, Jr.)

erty, previously marked for Identification as Defendant's Exhibit 65, were received in evidence.)

Q. (By Mr. Biggs): As a matter of fact, during all of the years of 1949 to and until you talked with Mr. Hoffman you did not have any objection to U. S. Plywood taking timber off the property?

Mr. Dezendorf: Well, I would object to that. It goes for a period way long before he acquired any interest in it.

Mr. Biggs: I am talking about '52.

Mr. Dezendorf: You said '49. [76]

Mr. Biggs: All right.

Q. From '52 when you first acquired an interest in it?

A. I don't think I ever made any objection.

Q. No. That wasn't the question. I said you did not have any objection to their taking the timber off——

Mr. Dezendorf: Well——

The Witness: No.

Mr. Dezendorf: ——I would object to that.

Mr. Biggs: The answer is No.

Mr. Dezendorf: If he didn't know what his objection was, how could he object?

The Court: He can say he had no objection, and then you can bring out that he didn't know his rights.

Mr. Dezendorf: Of course, this is all in the Agreed Facts in the pretrial order. I don't know why he is going into it.

(Testimony of John N. Seaver, Jr.)

Mr. Biggs: This is difficult. I am not asking whether he—I didn't—I asked if he had an objection. That calls for a statement of his mind.

Q. Did you have an objection at that time?

A. No.

Mr. Biggs: All right. I think that's all.

Redirect Examination

By Mr. Dezendorf:

Q. Mr. Seaver, you would have objected if you knew they [77] weren't entitled to take the timber from the property when they took it?

A. If I had known it, of course.

Q. Now, did you cut this timber on your land in 1955 before the contract with U. S. Plywood, dated August 19th, 1955, was actually executed?

A. Yes. I cut timber before that was ever signed.

Q. On the anticipation that it would be signed some time? A. Yes.

The Court: Did you cut any after the contract was signed?

The Witness: I don't remember the exact date it was signed. I had the timber all cut way before December; I know that—I mean before the last of December. I cut, maybe, the early part. But I don't remember the exact dates.

The Court: Had you seen a draft of the contract before the final one was ever presented to you for your signature?

(Testimony of John N. Seaver, Jr.)

A. Well, I was logging their timber first on this road right of way. And they talked about a contract; that they would have to fix one up, but they just didn't seem to get around to it. That was early in the summer.

The Court: Had you ever executed other kinds of contracts with U. S. Plywood?

The Witness: I don't believe I had ever signed any timber contracts. The first I ever signed with them. [78]

The Court: What do you mean, a timber contract? A contract authorizing you to cut timber?

The Witness: Yes.

The Court: How did you do it before, just on oral understanding?

The Witness: I logged timber of theirs on an oral understanding, yes, in the summer of '55.

The Court: Who wanted you to sign this contract; they, or did you suggest that you have a written contract?

The Witness: No; I think they said they would have to have a contract signed.

The Court: All right.

Mr. Dezendorf: That's all.

Recross-Examination

By Mr. Biggs:

Q. Had you ever signed a logging contract before with anyone?

A. I don't believe I ever signed a contract for gypso logging.

(Testimony of John N. Seaver, Jr.)

Q. You don't think you ever had?

A. No; I don't believe——

Q. Why didn't you ask for an extension of time till December if you had long since completed your work?

A. At that time this other timber that was felled was still laying there, couldn't be gotten out.

Q. That's what I can't understand. Why couldn't it have been [79] gotten out at the time it was felled?

A. In gravel road, wintertime, dirt?

Q. It was felled after the rain set in?

A. No.

Q. You couldn't get it out in August when the roads were dry?

A. That was a job that we worked in when we was cutting their other—removing other timber of theirs. Maybe just a day in a week or part of a day we were cutting on that.

Mr. Biggs: That's all.

Mr. Dezendorf: That's all, Mr. Seaver.

The Court: That's all. I think it might be well to take a short recess for the benefit of our Reporter whose hands get tired.

(Witness excused.)

(Recess taken.)

Mr. Dezendorf: Mr. Jones, will you take the stand? [80]

HERBERT R. JONES

produced as a witness in behalf of the Plaintiff, having been first duly sworn by the Clerk, was examined and testified as follows:

The Court: Mr. Biggs, do you know Mr. Jones?

Mr. Biggs: Yes, sir.

The Court: Are you satisfied with his qualifications?

Mr. Biggs: I admit his qualifications, your Honor.

Direct Examination

By Mr. Dezendorf:

Q. Mr. Jones, you live here in Eugene?

A. Yes.

Q. You are a Forest Engineer?

A. That's right.

Q. While they have admitted your qualifications, I think it would be a little helpful if you would tell the Court the length of time you worked for Weyerhaeuser Timber Company and the various titles that you held and the areas in which you worked.

A. Well, I started in to work for Weyerhaeuser Timber Company in 1926 as a—on the survey party just as a chairman. And then I worked from various jobs—I have worked as a timber cruiser for Weyerhaeuser Timber Company and I have been a party chief. And the last job I had with them in Springfield, I was their logging engineer for the Springfield branch. [81]

(Testimony of Herbert R. Jones.)

Q. You worked early in your career up at Tacoma, did you not? A. That's right.

Q. When did you come down here?

A. I came down here in November, 1941.

Q. How long did you work for Weyerhaeuser here in this area?

A. From 1941 to 1951, with the exception that I was in the Army for three years—three and a half years.

Mr. Biggs: Excuse me, Mr. Jones. Did you say you came here in '31 or '41?

The Witness: '41.

Mr. Biggs: '41.

Q. (By Mr. Dezendorf): When did you leave Weyerhaeuser and open up your own shop?

A. July, '51.

Q. Are you the gentleman who with Mr. Paul Sanders, representing U. S. Plywood, made the joint cruise of the Seaver property?

A. I am.

Q. Now, Mr. Jones, are you familiar with the various methods of trading in timber which were in use in Lane County in 1942? A. Yes.

Q. And what were they?

A. Well, there was four methods—four, possibly five. But four methods of—well, one method was to—— [82]

The Court: One second. I don't see the relevancy of this. If Mr. Biggs' statement is correct that there is no disagreement between the seller and the buyer,

(Testimony of Herbert R. Jones.)

what difference would it make if there were a dozen different methods of dealing in timber?

Mr. Dezendorf: Well, if I might say this, your Honor, I know that all of us are familiar—intimately familiar with the way in which timber as a commodity is bought and sold. But there may be those in other courts who are not. And I thought it might be——

The Court: Well, I appreciate that. But I can't see the relevancy. And, in any event, I think it's anticipatory now.

What do you want to show by this witness?

Mr. Dezendorf: I want to show that there are four methods of——

The Court: All right. After you have shown that?

Mr. Dezendorf: All right. Then I wish to go into what merchantable timber he believes was on this property as of May 4, 1942, and various other phases as we go through the logging of the property.

The Court: Well, why do you need that preliminary statement in order to go into it?

Mr. Dezendorf: We will—I have got to get it into the record, I think, from some source. And I think he is [83] the most qualified man to do it.

The Court: All right.

Mr. Dezendorf: Because I am just afraid that someone not as familiar as we are may not know of the various ways of buying and selling timber that were in effect at that time.

(Testimony of Herbert R. Jones.)

The Court: Did you buy and sell timber for Weyerhaeuser Timber Company?

The Witness: I have bought and sold timber for myself and for Weyerhaeuser, both.

The Court: All right; go ahead.

Q. (By Mr. Dezendorf): Will you tell us what the four methods were?

A. There was one method was to sell the timber and—I mean sell the land and the timber that was growing on the land. And another method was to sell the timber and not the land. And a—there was another method that would sell the merchantable timber and not the land. And then in recent years they have sold the timber by diameter classes and not the land.

Q. Now, Mr. Jones, for the purposes of the following questions that I will ask you will you please accept this definition of merchantable timber: Merchantable timber is that timber which has a commercial value and can be economically and profitably harvested, taking into account its size, quality, location, accessibility, demand and market conditions? Now, do you have [84] an opinion, Mr. Jones, as to what timber on the Seaver property with which you are familiar was merchantable on May 4, 1942?

Mr. Biggs: I object to the question, if the Court please, because it imports an improper standard into the definition. Whether or not timber can be economically harvestable is not the test. And it is so stated. And all of the factors stated except that are factors of varying importance. It's not an inclusive

(Testimony of Herbert R. Jones.)

test and it's not binding on the particular parties to this transaction.

The Court: Well, I thought that the Supreme Court in *Daugherty vs. Harris Pine Mills* used the economic test as one of the standards.

Mr. Biggs: I thought they expressly overruled that, if the Court please. Go ahead.

Mr. Husband: Excuse me, your Honor. I would like to direct your attention, first to *Dahl* against *Crane*. That was one of the earlier cases in which the Court expressly rejected that concept. And, also, on rehearing in *Hughes* against *Heppner* the Court in answering Mr. Justice Warner's dissent stated that the Court did not hold as Mr. Justice Warner had indicated that economic feasibility of logging a tract had anything to do with merchantability.

The Court: Well, do you want to delete that particular test at this time? Then I am going to let you do it at a [85] subsequent time.

Mr. Dezendorf: I will be happy to. So, perhaps I had better restate it. Now, which one was it you objected to, Mr. Biggs?

Mr. Biggs: Economic feasibility and operability.

Mr. Dezendorf: I didn't talk about operability.

Mr. Biggs: I thought you used that also as part of your economic test?

Mr. Dezendorf: No.

Mr. Biggs: All right.

The Court: You mean merchantability does not depend upon the cost of taking timber out and its accessibility, and things of that kind?

(Testimony of Herbert R. Jones.)

Mr. Biggs: Those are all part of it, your Honor. But the fact is timber may be salable although it cannot at the moment be profitably or economically harvested.

The Court: At the moment.

Mr. Biggs: That's what he is talking about. That's the thing that they are—that his merchantability test is applied to.

The Court: All right. Delete that one standard at this time.

Mr. Dezendorf: If I knew which one it was, I would. That's my problem.

Mr. Biggs: If you didn't use economic—— [86]

Mr. Dezendorf: I did use economic.

The Court: Show him the definition.

Mr. Biggs: And can be economically and profitably harvested. I thought that's what he said, your Honor. And I object to that standard specifically.

Of course, my objection is a little broader. I think the test of merchantability is what the parties intended under all of the circumstances.

Mr. Dezendorf: Well, I know now what he is objecting to, so I can state it differently and then if it is not objectionable then we can go on to the next one.

Q. Mr. Jones, in answering my following questions will you please accept this definition of merchantable timber: Merchantable timber is that timber which has commercial value, taking into account its size, quality, location, accessibility, demand and market conditions?

(Testimony of Herbert R. Jones.)

The Court: All right. Now, ask him the question.

Mr. Biggs: I am sorry——

Mr. Dezendorf: Excuse me.

Mr. Biggs: Oh, excuse me.

Mr. Dezendorf: I thought the Court—did I hear an objection?

The Court: No. No. I just said ask him now the specific question. I am wondering whether the question is specific enough. [87]

Mr. Dezendorf: Well, I haven't asked the question yet.

The Court: Yes. But I heard you the last time.

Mr. Dezendorf: All right. Okeh.

The Court: I think it might be defective for want of specificity.

Mr. Dezendorf: I think I know what your Honor is raising.

Mr. Biggs: I don't want to interrupt now. The question, I anticipate, now, will be the same as before, and I want the record to show our objection to that definition—of that definition of merchantability.

The Court: You can have that objection. On what ground? I thought I sustained your objection the last time.

Mr. Biggs: You did, the specific one. My objection was just a little bit broader than that. I don't think a dictionary definition of merchantability is the definition applicable in the case. I think it must include also and as the cardinal principle the intention of the parties to the transaction as to what tim-

(Testimony of Herbert R. Jones.)

ber they regarded as merchantable and salable, considering——

The Court: Well, I am going to overrule the objection.

Mr. Biggs: All right.

The Court: Now, ask the first specific question.

Q. (By Mr. Dezendorf): Mr. Jones, having that definition of merchantable timber in mind, do you have an opinion as to what old-growth and second-growth fir and hemlock timber, if any, [88] standing on the Seaver tract involved on May 4, 1942, was merchantable? And the answer should be either Yes or No.

A. Yes.

Q. What is your opinion in that regard?

A. Well, my opinion is that in 1942 that the only merchantable timber would be the old-growth timber.

Q. Now, you made this cruise of the property with Mr. Sanders representing U. S. Plywood. At my request have you prepared a map and made computations to show the amount of timber that was taken off the Seaver property prior to June 24, 1950?

A. Yes, we have.

Mr. Dezendorf: May I ask that Exhibit 7 be handed to the witness, please?

(Whereupon the Crier handed the document to the witness.)

Mr. Dezendorf: May I approach the witness, your Honor?

The Court: Yes.

Q. (By Mr. Dezendorf): Now, will you explain

(Testimony of Herbert R. Jones.)

that exhibit to us? First, explain the part under the sheet. What is the property which is involved so far as the lines are concerned?

A. Well, we have drawn two sets of lines—three sets of lines here. One of the—one line, the green line, shows what we believe to be logged in 1949. And then we drew these other lines, these that are outlined in blue, which was logged in 1950. And this down in here (indicating) was logged in 1950. [89]

The yellow shows the farmland which never had any timber on it at all.

Q. Now, with respect to the penciled or dark lines, do they encircle the Seaver property itself?

A. They do. That's the boundary of the Seaver property.

Q. So that everything within the lines is the property that's involved in this action?

A. That's right.

Q. Now, can you give us by volume your calculation as to the amount of old-growth, second-growth, hemlock, etc., that was removed from the land prior to June 24, 1950?

Mr. Biggs: Now, if the Court please——

The Court: Don't answer the question yet.

Mr. Biggs: ——I would like—may I ask a question in aid of an objection?

The Court: Yes, you can ask him any question you want about how he got the information for the map.

Mr. Biggs: Yes. That's what I want.

(Testimony of Herbert R. Jones.)

Upon what information are you ascribing the volumes to year, Mr. Jones?

The Witness: Well, we made a stump count when Sanders and I worked on this.

Mr. Biggs: Yes.

The Witness: And we divided it into two-and-a-half-acre tracts and then we got the volume on each two-and-a-half-acre [90] tract.

Mr. Biggs: Yes.

The Witness: Then we superimposed this area that was logged over the map, and I took it from that.

Mr. Biggs: Upon what information did you base that as to when the logging occurred?

The Witness: From the information that was given to me by Mr. Seaver. Of course, I had no information as to exactly when the logging was——

Mr. Biggs: Yes. You couldn't tell that by your stump cruise?

The Witness: No.

Mr. Biggs: And you have no other information? That's hearsay information?

The Witness: That's right.

Mr. Biggs: That's the basis of my objection to the exhibit, your Honor.

The Court: Why do you have a witness testify as to volume of stumps when you have the actual records of the company? I don't understand that.

Do you say the company's records are fraudulent in this respect?

Mr. Dezendorf: No, I do not at all.

(Testimony of Herbert R. Jones.)

The Court: But this is so much more difficult to anticipate. [91]

Mr. Dezendorf: Well, your Honor has missed the point that we are trying to make, I believe. The company's records show that they only acquired 4,882,000 feet of timber and yet they cut off, according to the admitted joint cruise, over 11,000,000 feet of timber. So we have got to show how much was taken off before June 24, 1950, and how much was taken off thereafter.

The Court: Well, I don't understand why.

Mr. Dezendorf: Because, No. 1, the statute of limitations. We can't recover for anything that was taken off before June 24, 1950; therefore, we have got to show how much was taken off within the period of the statute of limitations before we can recover anything.

And, according to the company's records——

The Court: I thought all these fancy cruisers—and I am not talking about Mr. Jones alone—but you have Mr. Thomas who has been in my court all last week and Mr. Hoffman and all the expensive ones and they say that when they cruise an area it's nothing unusual to have two and three times the volume of the cruise. They thought it was the ordinary thing.

Mr. Dezendorf: Well, if you buy all the timber, that's all right. But here they bought merchantable timber.

The Court: But even on the estimates.

Mr. Dezendorf: Well, your Honor, we are doing

(Testimony of Herbert R. Jones.)

the best [92] we can to try to present the case the way we see it. I would like any suggestions you have as to what we should do, because I see no alternative but to try to find out how much we removed after the period during which the statute of limitations does not operate.

The Court: Won't the records of the defendant show that?

Mr. Dezendorf: They show everything removed in 1950 and nothing left.

The Court: Oh, no. That's not true.

Mr. Dezendorf: It is.

The Court: That's not true. They filed this affidavit that every company practically files. I would hate to examine all the records of the timber companies that you represent to find out whether they filed those.

Mr. Dezendorf: May I explain to you what their inventory and depletion records show? It's an admitted record now. That's the only record they have of what timber they had on their land and when they removed it.

Mr. Biggs: Here was the difficulty, your Honor. I must say this in aid of Mr. Dezendorf's position. It seems a little bit difficult to understand in the beginning, but when the Seavers' timber was taken in it was thrown into another area. It was never kept as the Seavers' tract specially. So we couldn't tell by years from the logs that were delivered to us [93] how much of those logs came from the Seaver tract and how much came from the other.

(Testimony of Herbert R. Jones.)

We thought that the best we could do is to estimate it by having two cruisers go out and attempt to agree on volume. And I have no objections to that. I am stipulating to the volume of their cruise. I was just objecting to the cruiser attempting to testify as to the time when these particular——

The Court: Well, I don't see any objection to that because that's based upon the assumptions made that the testimony of Mr. Seaver is correct.

Mr. Dezendorf: That's right.

The Court: So I didn't have any objection to that. I thought that was all right. I was under the impression that the company had records of the volume of timber removed from this tract and I couldn't see why he would want to estimate from stumps that which could be shown by the records. All right. Your objection is overruled. Let him testify.

Q. (By Mr. Dezendorf): Will you go ahead, please?

A. Well, let's see—we estimated there was 6,121,000 feet of timber removed in—before June 24, 1950.

Q. What species and types go into that total?

A. Well, there is old-growth fir, second-growth fir and hemlock.

Q. Well, will you give us the figures on each one?

A. Well, timber logged in 1949 is as follows: Old-growth [94] fir, 467,000 board feet; Second-growth fir, 94,000; Hemlock, 28,000. Timber logged

(Testimony of Herbert R. Jones.)

in 1950 prior to June 24th: Old-growth fir, 4,839,000; Second-growth fir, 576,000; and Hemlock, 117,000.

Mr. Dezendorf: Now, I have forgotten whether the Court admitted this exhibit or——

The Court: No. This exhibit was not admitted originally. But I am going to overrule the objection and admit it at this time.

Mr. Dezendorf: Thank you, your Honor.

The Clerk: 7?

The Court: Exhibit 7.

(At this point Plaintiff's Exhibit 7, previously marked for Identification, being a map showing area logged prior to June 24, 1950, with computation sheet attached, was thereupon received in evidence.)

Mr. Biggs: My objection really wouldn't go on the basis you are admitting it, your Honor. If they want to use it just to illustrate this testimony, that is all right. But I didn't want to be bound without objection to the accuracy of their figures since it is argumentative on their case. That's all.

Mr. Dezendorf: May I hand this exhibit to the witness and ask him about it? [95]

The Court: Go ahead. What number is it?

Mr. Dezendorf: I think it has been admitted. 8.

The Court: 8 is admitted.

Q. (By Mr. Dezendorf): Mr. Jones, will you just tell us how you prepared this Exhibit 8 so we will all understand it?

A. Well, this exhibit is the same outline of the

(Testimony of Herbert R. Jones.)

land of the Seaver property. And this is prepared from the affidavits. And when the affidavit showed that a certain area had been logged it was marked, it was divided into 40's. And this particular piece—affidavit says it was logged between January 1st, 1949, and January 1st, 1950. So that's the way we marked it.

Q. So, what you did was just take each affidavit and apply it to the area which it purported to cover and show the dates that were shown on the affidavit with respect to when the timber was removed; is that correct?

A. That's correct.

Q. Now, I am showing you Exhibit 9, Mr. Jones. Did you prepare it in response to my request for you to show the volume of timber that was removed from the Seaver property after the removal affidavits had been filed with respect to each particular piece?

A. That's right.

Q. Now, will you just explain to us what the brown circled areas mean? [96]

A. The brown circled areas are areas that were logged after the affidavits were filed that that particular area had been—there was nothing left on it.

Q. And the yellow area, again, circles the farmland?

A. Nothing on that; never was.

Q. Now, will you tell us the volumes that were removed of the various types of timber after the timber affidavits were filed with respect to each piece?

A. Well, you mean how much was logged in '53 and how much was logged in '55?

(Testimony of Herbert R. Jones.)

Q. Yes. What I am trying to get at is—well, let's get a total first and then you can break it down any way you want. How much timber was removed?

A. Well, there was a total——

Q. From the areas after the timber affidavits—or timber removal affidavits were filed.

A. 3,962,000.

Q. And what types was it broken down into?

A. Old-growth fir, second-growth fir, hemlock and cedar.

Q. What were the amounts of each?

A. Well, old-growth fir, 669,000. This is in 1953. Second-growth fir, 2,366,000; hemlock, 350,000; cedar, 7,000. And logged in '55 was second-growth fir, 488,000; and hemlock 82,000.

Mr. Dezendorf: We will offer that in evidence.

The Court: That's been admitted, too. [97]

Mr. Dezendorf: Very well.

(At this point Plaintiff's Exhibit 9, previously marked for Identification as a map showing logging after affidavits and date of logging, with computation sheet attached, was received in evidence.)

Q. (By Mr. Dezendorf): Now, Mr. Jones, bearing in mind, again, the definition of merchantable timber which I gave you immediately prior to the last question regarding merchantable timber, do you have an opinion as to how much merchantable old-growth and second-growth fir and hemlock timber

(Testimony of Herbert R. Jones.)

was standing on the property on June 24, 1950, which was merchantable as of May 4, 1942?

A. I can't give you the exact figure, but as to the old-growth in the Section 31 I think it was around seven or eight hundred thousand. But I can't remember exactly.

Q. Was there any other merchantable timber on the property on June 24, 1950, which was merchantable as of May 4, 1942, other than that that you have just mentioned?

A. No; nothing that was—based on 1942 merchantability it was not merchantable.

Q. I take it, then, that using the same merchantability test that it would be your judgment that everything that was removed from the property after June 24, 1950, except the old-growth was not merchantable on May 4, 1942; is that correct? [98]

A. That's correct.

Q. Now, you have not taken into account in determining merchantability the abandonment, if any, that might have occurred since filing of the timber affidavits, have you?

A. I can't—would you repeat that question?

Q. Yes. You haven't given any weight in arriving at your opinion to the fact that timber removal affidavits were filed?

A. Oh, no. I haven't. That doesn't enter into it. Mr. Dezendorf: I think you may examine.

(Testimony of Herbert R. Jones.)

Cross-Examination

By Mr. Biggs:

Q. Now, Mr. Jones, you went out and made a joint stump cruise with Mr. Sanders, the two of you agreeing on your methods and techniques, and so on, counting stumps and measuring sizes of trees and determining species? A. Yes.

Q. And you came up with the total volume of timber that had been removed from the Seaver tract; isn't that correct? A. That is correct.

Q. Do you know how much of that was old-growth and how much was second-growth and how much was hemlock, and so on?

A. Well, I do know, yes.

Q. You haven't any information—I mean you couldn't tell from your own examination when it came off, of course? [99]

A. Not too exactly, but we could tell when the 1955 logging came off. But the rest of it was pretty doubtful.

Q. Yes. So that the maps that you have drawn are just to illustrate Mr. Seaver's testimony in part that the area was logged at certain times according to his testimony and according to some affidavits; is that correct?

A. That's partly according to Mr. Seaver's testimony; although you can tell that the old-growth fir in the bottom was a great deal older than—I mean that was the original first logging. And I think that

(Testimony of Herbert R. Jones.)

old-growth area is pretty accurate, no matter whose testimony we are going to have.

Q. Well, I thought you said there was a considerable amount of it taken off after June 4th, 1950, of old-growth?

A. I didn't say a considerable amount; I said there was 700,000 out of about 6,000,000.

Q. Only 700,000? I didn't get your figure.

A. Yes.

Q. You say that's all of the old-growth that came off after June 4, 1950? June 24th, 1950?

A. I think that's right. I think that's what I said.

Q. Well, is that based on your observations or based on information given to you?

A. That was based on our observation. I know that is part of Section 31 that wasn't logged until 1953.

Q. Now, let me understand you. You can tell from what you [100] saw out on the ground yourself that there was only 700,000 of 6,000,000 feet of old-growth that came off after June 24th, 1950? Is that what you mean to say?

A. No; I can't tell. I'd say after January, 1950, 'cause I don't—

Q. I mean, you can't tell even within six months whether a tree has been cut eight years ago?

A. No, I can't. I can't within two years.

Q. Well, I wouldn't have thought so. Can you tell within three years?

A. Well, probably within two or three years.

(Testimony of Herbert R. Jones.)

Q. I see. So, then, actually your testimony as to the time of logging as set up in the charts in the main is taken from information that others have given you, is that correct?

A. In the main, yes. But we—I can still say that I know that that timber along the bottoms was taken off in 1949 and 1950.

Q. Because it was the first of the logging or because you can tell that it was nine years ago that it was taken off?

A. Because it was the first of the logging.

Q. Yes. If I understand your testimony correctly, what you are saying—your last answer to the merchantability question is the same as your first one that there was nothing that was merchantable on the Seaver tract according to the definition that Mr. Dezendorf gave you except old-growth [101] timber?

A. That's what I said.

Q. Yes. And upon what do you base that? Why was the old-growth, in other words, merchantable?

A. Because old-growth was a salable commodity and has been in Oregon for a great many years.

Q. What do you mean "salable"? You mean salable in stands or by log?

A. Both.

Q. Well, is that the test, then, in your mind?

A. Well, I think that's what I think is merchantable, yes.

Q. Well, that's what I want to know, if that's what you based it on.

Mr. Dezendorf: Just a minute. He based it on the definition that I gave him.

(Testimony of Herbert R. Jones.)

Mr. Biggs: This is cross-examination.

The Court: This is cross-examination. You go ahead.

Mr. Dezendorf: Yes.

Q. (By Mr. Biggs): The two elements that you are thinking of, then, is that in stand or by logs that timber had a sale in the sense that some buyer would pay value for it and some seller would sell it for value?

Mr. Dezendorf: I would have——

Q. (By Mr. Biggs): Is that correct?

Mr. Dezendorf: Excuse me before you answer. I would have [102] to object to any question whether it be cross-examination or otherwise which asks this man whether he based his answers——

The Court: Well, I am going to stop you right now because you can't start rehabilitating your witness. This is cross-examination. And I am going to order you to sit down and not say anything while this examination goes on because I think that this is perfectly permissible cross-examination. And you can't tell a witness how to answer the questions.

Mr. Dezendorf: I am not trying to tell the witness, your Honor. But I think I am entitled to make an objection, to raise——

The Court: All right. Your objection is noted. But the witness is going to answer these questions.

Mr. Dezendorf: I haven't had a chance to finish my objection.

The Court: Well, we are going to do it.

(Testimony of Herbert R. Jones.)

Will you step out of the room for a minute and close the door?

(At this point the witness left the courtroom in compliance with the Judge's request.)

The Court: All right. Go ahead.

Mr. Dezendorf: I object to a question to this witness which infers or suggests that in answering my questions as to what was merchantable, which were based upon a definition which I gave him, were based upon other considerations. The [103] point is this: I think I must preserve in this record the point as to whether merchantable timber—and the word “merchantable” is a word which the Court must define—or whether evidence other than the Court's definition of it may be used in the action.

Now, I don't know whether it is intentional or not, but I have a feeling from the last two questions that Mr. Biggs asked this witness that he was trying to confuse him and ask him what his own definition of merchantable timber may be as distinct from the definition which I gave him.

Now, if that is what he is trying to get at I must preserve my objection to that question, the legal question which I think is one of the fundamental questions in the case.

The Court: Well, your objection is noted. All right. Call the witness back.

(At this point the witness entered the courtroom and resumed the witness stand.)

(Testimony of Herbert R. Jones.)

The Court: Do you want to ask the question over again?

Mr. Biggs: Yes.

The Court: All right.

Q. (By Mr. Biggs): In answering Mr. Dezen-dorf's question considering old-growth only was merchantable, you did that on the basis that you thought it was salable, is that correct?

A. Salable in 1942? [104]

Q. In 1942. A. Yes, I think that's correct.

Q. Yes. The element of salability is the thing that influenced your judgment as to whether the old-growth was merchantable and the second-growth was not, is that correct? A. That's right.

Q. Yes. So that if second-growth timber would bring a price on the market by a seller who was willing to sell and a buyer who was willing to buy, you would say, then, that the second-growth timber was merchantable because it was salable, isn't that correct? A. That's right.

Q. Yes. The test throughout is salability, is it not? A. That's right.

Q. Yes. Isn't it common practice in this area, and wasn't it in 1942 and is yet, to sell fir timber by stands and not by trees?

A. Well, yes. They don't sell it by the tree very often.

Q. No. When you buy a stand of fir timber you take what is on the stand? A. That's right.

Mr. Dezen-dorf: May I interpose an objection?

The Court: Yes. Go ahead.

(Testimony of Herbert R. Jones.)

Mr. Dezendorf: I would object to the question for the reason and upon the ground that we are dealing here with a [105] contract which deals with merchantable timber, not just plain timber, and the distinction is between whether you are buying all the timber or just the merchantable timber, or what.

Mr. Biggs: Well, if you are buying—I am sorry.

The Court: Your objection is noted and overruled.

Mr. Biggs: Yes.

Q. The contract on which you are buying merchantable old-growth and merchantable second-growth and merchantable hemlock, you are buying timber of that species as salable timber, are you not?

A. That's right.

Mr. Biggs: Yes.

The Court: Will you tell us right now what is the definition of old-growth and second-growth as it pertains to the timber in this area?

The Witness: Well, second-growth timber in this particular area we are speaking of is usually from 40 years to 110. 110.

Mr. Biggs: How old?

The Court: 110. And old-growth is everything older.

The Witness: Well old-growth—there is quite a spread. Old-growth is usually from about 200 years on. There is an in-between growth we call red fir or bastard growth that runs from about 110 to 200.

The Court: And what do they call third-growth over here? [107]

(Testimony of Herbert R. Jones.)

The Witness: Well, what third-growth is is what we are calling second-growth today.

The Court: Oh.

The Witness: It's a local term usually in the Coos Bay area.

The Court: What is the other word for third-growth?

The Witness: Red fir.

The Court: Go ahead.

Mr. Dezendorf: I didn't get that answer.

The Court: Red fir.

Q. (By Mr. Biggs): Do they sometimes call old-growth yellow fir, too?

A. Old-growth yellow fir is a very old fir as a rule.

The Court: They don't use the word third-growth in this area; it's usually in the Coos Bay area; isn't that right?

The Witness: Coos Bay area is the first time I became acquainted with it.

Q. (By Mr. Biggs): Of course, you were buying for Weyerhaeuser until 1951, is that correct?

A. Well, I wasn't doing much buying for Weyerhaeuser. I was their logging engineer. I bought some small amounts for Weyerhaeuser, but I was not their timber buyer or anything.

Q. Of course, Weyerhaeuser was a very large timber owner during those years and still is. It's the largest timber owner in this area. We all know—that's true, isn't it? [107] A. That's right.

(Testimony of Herbert R. Jones.)

Q. It was interested primarily in old-growth stands where it could get old-growth stands?

A. That's all they were interested in.

Q. All they were interested in. Do you mean to say, though, that you did not know of any operations in exclusively second—in second-growth timber in 1942, Mr. Jones?

A. Not in this area.

Q. How close to this area?

A. Well, I knew of quite a few in Washington. But I didn't—I wasn't familiar with any in Oregon in 1942.

Q. Yes. Were you looking the country over, examining the potentials of second-growth timber sales and advising yourself on what second-growth operations were being conducted and what second-growth timber stands were being sold?

A. No.

Q. So that you can't say that you are an expert and don't pretend to be an expert on the market for second-growth timber in Lane County in 1942?

A. No, I am not.

Q. Oh. You are not?

A. I wouldn't—wouldn't say I was an expert on timber in 1942, in Lane County. I had only been here a year.

Q. Oh. I thought that was what Counsel was proposing, you as an expert on that—on timber sales in Lane County and [108] merchantability in Lane County, in 1942.

A. No.

Q. I see. You don't claim to be an expert, then, and don't have a reliable opinion about those matters?

A. No; I don't claim to be an expert.

(Testimony of Herbert R. Jones.)

Mr. Biggs: That's all.

The Court: Go ahead.

Mr. Dezendorf: That's all?

The Court: Yes.

Redirect Examination

By Mr. Dezendorf:

Q. Mr. Jones, did you make an inspection of the records of the Forest Service office at Mapleton to determine when the first sales of second-growth timber were recorded in that area in its office?

A. I did.

Q. When did you find the first sale of second-growth timber in this area?

The Court: Is that Government timber?

Mr. Dezendorf: Yes.

The Court: Oh. Yes. Go ahead.

Mr. Dezendorf: Forest Service.

The Witness: 1943.

Q. (By Mr. Dezendorf): And that was the first one, is that [109] correct?

A. That was the first one that we could find.

Q. Now, when did Weyerhaeuser make its first purchase of second-growth in this particular area here?

A. Well, Weyerhaeuser has never purchased any second-growth in this area without purchasing the land with it. But they started to buy second-growth timber in around 1948 and '49. They had purchased one purchase in about 1944, but very little was made 'til about 1948.

Q. Now, in your own experience as distinct from

(Testimony of Herbert R. Jones.)

Weyerhaeuser's and on your own account did you every buy any second-growth timber here in Oregon?

A. Yes.

Q. When did you buy yours?

A. I bought mine in 1946.

Q. In what area did you buy it?

A. In the Coos Bay area.

Q. How much did you pay for it?

A. I bought 10,000,000 feet for \$15,000.

Q. Do you know whether that particular block had been for sale for some time before you bought it?

A. As I understand it, it had been for sale for two or three years and no one would—had approached them about it.

Q. What was its situation with respect to accessibility to market or roads or water? [110]

A. Well, I would say it was very accessible because right on tidewater—

Q. Now, Mr. Jones, what was the age of the hemlock on the Seaver property?

A. Well, I think the hemlock was about 20 to 30 years older than the fir in most cases. It was about 100 years old.

Q. So that that would fall within a second-growth classification?

A. It grew in after the fire.

Q. So that that would be second-growth; is that right?

A. That would be second-growth, too, yes.

Q. And the only real old-growth was the old-growth fir, is that correct?

(Testimony of Herbert R. Jones.)

A. That's correct.

Q. So that you really have four species or divisions there; you have the old-growth fir, second-growth fir, second-growth hemlock, and cedar; is that correct?

A. That's correct.

Q. Do you have any explanation for the fact that the old-growth was in the bottoms in the Seaver area?

A. Well, that's usually where the fire skips it, in these large forest fires, runs from over the top of the ridge and usually the bottoms are saved. If anything is salvaged at all in a fire, why, it's the timber in the bottoms.

Q. And you could see from your stump cruise out there that [111] the old-growth on the Seaver property was in the bottoms; is that correct?

A. That's correct.

Q. Now, Mr. Jones, in answering my questions with respect to merchantability on direct, did you have in mind the definition of merchantable timber which I gave you?

A. In answering Mr. Biggs' questions, you mean?

Q. Answering mine. A. Oh, yes.

Q. When I was questioning did you accept the definition which I gave you? A. Yes.

Mr. Dezendorf: That's all.

Recross-Examination

By Mr. Biggs:

Q. What was that definition?

A. Do I have to repeat that definition?

(Testimony of Herbert R. Jones.)

Q. Well, I think if it was important as a consideration in your mind you should know what he was talking about if it differs from what you told me the element of merchantability was.

A. Well, merchantability is determined by the quality and the size and the accessibility and the—I'd say that's—of the timber. [112]

Q. But the ultimate test is whether it's salable?

A. That's true.

The Court: What did you say?

The Witness: I said yes. It has to be salable, too.

Q. (By Mr. Biggs): Well, salable is the test, isn't it, of merchantability?

Mr. Dezendorf: There I would object because he is asking this witness' opinion of his own as to what merchantability is. And I think that's not proper in this case, with the contract that we are dealing with.

The Court: Your objection is overruled.

Mr. Biggs: Yes.

Q. Isn't it, Mr. Jones?

A. You said that salability is merchantability?

Q. Yes. It's the ultimate test of merchantability, is it not?

A. Well, it is and it isn't. I would say it was one of the ultimate——

Q. But so far as what the practices were here and what the merchantability was and what people were accepting and selling with respect to second-growth in 1942, you don't know? A. No.

(Testimony of Herbert R. Jones.)

Q. Now, you said that you were buying timber for Weyerhaeuser in 1941, 1942?

A. No; I didn't say I was buying any for Weyerhaeuser in [113] 1941 to '42.

Q. I'm sorry. Just small areas, I believe you said you were logging?

A. And not in 1941 and '42.

Q. They were buying, I believe, some timber, were they, between '41 and '51? A. Yes.

Q. And you say they were buying only old-growth stands. Well, now, that included second-growth, did it not?

A. Oh, yes. Of course, they buy four or five thousand acres. There is bound to be some second-growth in there.

Q. And they expected to include the second-growth in this old-growth when they bought a stand of timber?

Mr. Dezendorf: I object. They're not buying on a merchantability basis; they are buying land.

Mr. Biggs: We are going to find out.

Mr. Dezendorf: You are suggesting to him that that's what they were doing.

The Court: This is cross-examination. Go ahead.

Q. (By Mr. Biggs): They were buying it with the stand, were they not?

A. Buying timber stand and land with it.

Q. Yes. And land with it? A. Uh-huh.

Q. And on the old-growth the second-growth would be not [114] completely contiguous; it would

(Testimony of Herbert R. Jones.)

be included in the same stand to some extent, would it not? A. To some extent, yes.

Q. Yes. And you logged second-growth, did you not? A. What was that?

Q. And you logged second-growth with the old-growth? A. In 1942.

Q. Yes. Weyerhaeuser, as they came to a stand, they take the second-growth along with the old-growth in so far as the second-growth there, would they not?

A. Well, the second-growth doesn't grow right in with the old growth. It usually grows in a stand by itself.

Q. Sometimes there is a mixture and you have to take it, is that correct?

A. Yes. There is a few trees scattered in some-times all right.

Q. Yes. Would you take those?

A. Why, sure.

Q. The second-growth? A. Yes.

Q. What would you do with them?

A. We would log it in with the old-growth.

Q. Take them in and manufacture them?

A. Yes.

Q. You had a multiple-purpose mill, did you? I mean, you [115] had a mill geared to cut with a pony rig on it so that you—or a gang saw or something so that you could use the second-growth timber as well as the old-growth timber in your mill?

A. They didn't use the second-growth at a profit, but they brought it in with the old-growth.

(Testimony of Herbert R. Jones.)

Q. Well, whether they used it for profit or not they manufactured it and sold it, didn't they?

A. I presume they sold it.

Q. Yes. And at that time they were doing no—Weyerhaeuser was doing no manufacturing of second—no logging of second-growth other than as it was incidental to the old-growth, is that right?

A. I would say that. Of course, they didn't even have a mill here in 1942. I don't know what Weyerhaeuser was doing here.

We didn't have any mill here in '42—1942. Didn't build a mill 'til 1948.

Q. I don't quite understand what your duties were, then, between '41 and '51.

A. Well, I came down here in 1941 to do all the preliminary engineering for this mill that was built in 1946 and '47.

Q. Oh. You were not, then, in the woods working for them in the woods during that time?

A. Yes, I was in the woods, but I was—had gone from 1942 to '45 because I was in the Army.

Q. I see. But from—I see. '41 to '45 you weren't buying [116] timber and you weren't—you were trying to build a plant?

The Court: He was in the Army.

Mr. Biggs: No. '41 to—

The Court: '41 to '45.

Mr. Biggs: '42 to '45. One year.

Q. You were only here a year, then, till after the war? A. That's right.

(Testimony of Herbert R. Jones.)

Q. Yes. And the hemlock also grows in with the old-growth, too, doesn't it?

A. It definitely grows in with the old-growth.

Q. And you take the hemlock out with the old-growth, do you not?

A. That's right.

Q. Yes. That was the practice in Washington and Oregon as far as you knew it in 1942, was it?

A. It was.

Q. Yes. Frequently timber stands are sold and very profitably that are wholly inaccessible, are they not?

A. I don't know whether they're very profitable or not. They're sold.

Q. I say, they are sold at a good price?

A. Yes.

Q. A valuable price, even though they are inaccessible?

A. That's right.

Q. The logging, of course, to await the construction of a [117] road to them?

A. Yes. That's right.

Q. Yes. So you wouldn't say a stand of timber that simply was inaccessible on that account was not merchantable, would you, either in Washington, Oregon or——

A. It depends on what the stand was. I would say a stand of second-growth in 1942 would be unmerchantable because nobody would have bought it.

Q. Even though it was mixed in with some good old-growth?

A. Well, there wouldn't be a stand of second-growth mixed in with some good old-growth.

(Testimony of Herbert R. Jones.)

Q. I mean, on the same tract?

A. Well, if there was a—yes, it would be—it might be included with some old-growth that was on the same——

Q. Supposing somebody did buy it and did say merchantable second-growth and bought it, thought enough of it to name it——

A. I didn't get that question.

Q. Supposing somebody did buy the merchantable old-growth and second-growth? If there was a sale made on that basis that would be merchantable within the definition that you prefer here, as you have given us on your cross-examination, isn't that correct?

A. Well, the old-growth would be merchantable. The second-growth wouldn't necessarily be [118] merchantable.

Q. Well, if a man bought and paid for it, would that make it merchantable?

A. It would be in one sense, but it wouldn't be merchantable in the sense that the—that it would be—could be marketed at a profit.

Q. You're talking about the trees—individual trees of second-growth might not at that time be manufactured at a profit, is that what you are talking about?

A. Well, the whole stand of second-growth couldn't have been manufactured at a profit.

Q. Although the stand could be sold as a valuable asset?

A. Not as a—not as a stand of second-growth.

(Testimony of Herbert R. Jones.)

It could be sold if it was sold along with some old-growth.

Q. Well, if a man pays \$7,000 for a stand of timber in 1942 and he describes it as merchantable old-growth, second-growth and hemlock, don't you think he was intending to acquire the old-growth and the second-growth and the hemlock?

A. I don't think——

Mr. Dezendorf: Just a moment. I object to the question.

Mr. Biggs: That's argumentative and I will withdraw the question.

The Court: Yes. I am going to sustain the objection because it is argumentative. Any further questions?

Mr. Biggs: That's all.

Mr. Dezendorf: Not at this time. [119]

The Court: All right. Does the plaintiff rest, now?

Mr. Dezendorf: Does your Honor wish to continue on tonight?

The Court: Yes. Go ahead.

Mr. Dezendorf: We will rest at this point, then.

(Witness excused.)

(Plaintiff rests.)

Mr. Biggs: Well, I have got to mark exhibits and everything else. I would like to take a little time.

The Court: All right. You can mark the exhibits. I will tell you what we will do, then: Why

don't you mark the exhibits and talk to Mr. Dezen-dorf about it?

How about starting tomorrow at 9:30? Is that too late?

Mr. Biggs: That's fine, your Honor.

The Court: All right. How many witnesses do you have?

Mr. Biggs: Well, about eight or nine, your Honor.

The Court: We will be finished tomorrow.

Mr. Biggs: Maybe. Maybe. There is a possibility.

Mr. Dezen-dorf: Well, if the Court please, I assumed that when you say we are going to be finished tomorrow that we will [120] have a chance to rebut—

The Court: Oh, sure.

Mr. Dezen-dorf: —whatever testimony—

The Court: How many witnesses are you going to have on rebuttal?

Mr. Dezen-dorf: I don't know what his witnesses are going to testify to.

Mr. Biggs: I think you know generally what they are going to testify to.

The Court: I am not going to cut you off. I was just anticipating that probably we would be through. Do you want to start at 9:00? It's all right with me.

Mr. Biggs: Actually, our testimony will be a little longer than—I mean the witnesses might be a little longer than these witnesses have been, your Honor. We will do the best we can.

The Court: All right. Good. I assume that you want Mr. Jones to remain here. Is he going to testify again for you?

Mr. Dezendorf: It could be.

The Court: Yes. Well, you come back tomorrow.

Recess until the morning at 9:30.

(At 5:25 p.m. the Court adjourned.) [121]

Morning Session

(At 9:30 a.m. Court reconvened pursuant to last evening's adjournment.)

Mr. Biggs: No. 51 is a vicinity map. The Judge looked at it. I don't know whether it was admitted or not.

Mr. Dezendorf: No objection.

Mr. Biggs: No objection. 52.

Mr. Dezendorf: No objection.

Mr. Biggs: 53. Maybe you haven't seen this.

Mr. Dezendorf: No objection.

Mr. Biggs: Okeh. 54.

Mr. Dezendorf: No objection.

Mr. Biggs: 55.

Mr. Dezendorf: We have an objection to that.

The Court: All right.

Mr. Dezendorf: Do you wish it stated?

The Court: No. Anything you object to I am not going to let in. That's all right now.

Mr. Biggs: 56.

Mr. Dezendorf: No objection.

Mr. Biggs: 57.

Mr. Dezendorf: There may be an objection to that, based upon the fact that it's a combination of hearsay and the witness'—— [122]

Mr. Biggs: Same objection. 58?

Mr. Dezendorf: Same objection.

Mr. Biggs: 59?

Mr. Dezendorf: No objection.

Mr. Biggs: 60?

Mr. Dezendorf: No objection.

Mr. Biggs: 61?

Mr. Dezendorf: We object to that.

Mr. Biggs: 62?

Mr. Dezendorf: Object to that.

Mr. Biggs: 63?

Mr. Dezendorf: No objection.

Mr. Biggs: 64?

Mr. Dezendorf: No objection.

Mr. Biggs: 65?

The Clerk: It's in.

Mr. Dezendorf: We have one question I would like to raise there at this time on that. Mr. Seaver believes that two of the checks that are in there are payments for logs that he sold not from this property but some others. So that I want to have a chance to see the stubs that go with those.

Mr. Biggs: All right.

The Court: We will pass that.

Mr. Biggs: 66?

Mr. Dezendorf: No objection. [123]

Mr. Biggs: 67?

Mr. Dezendorf: No objection.

Mr. Biggs: 68?

Mr. Dezendorf: We object to that on—well, I won't say why.

The Clerk: It's already in.

The Court: Whenever he objects to anything——

The Clerk: No. I mean yesterday.

The Court: What?

The Clerk: 68, 69, 72 and 73 were received.

The Court: Then they are received. 68 is in. 69 is in.

Mr. Biggs: Yes. That's right.

The Court: And 70 is in.

Mr. Biggs: That's right. That's right.

The Court: Are you offering 71?

Mr. Biggs: Yes, your Honor.

The Court: All right.

Mr. Biggs: And 72, I think, is in. And 73 is in. Isn't that correct, Mr. Clerk? and 74, I think you put in, didn't you, Mr. Dezendorf?

Mr. Dezendorf: We put in the originals and your 74 is just photostatic copies of that.

Mr. Biggs: We don't care anything about that. Copies of exhibits. All right. In. Then 75 is a stereoscopic [124] picture which I showed you last night.

Mr. Dezendorf: We have no objection to the picture as such, but I am informed that the device with which you look at the map does not present a true picture because it only operates in one dimension, so that it makes the hills and gullies look much steeper because it does not extend the area out to its true proportion in comparison with the

downward view, so that it does not give a correct representation.

Mr. Biggs: I think that's valid, your Honor. I talked with Mr.—what's his name?—I mean you have to make some allowance for the fact that the map is distorted by reason of having looked at it while it's for illustrative purposes and the distortion is about 25 per cent. And I asked him what that meant on an angle and he said there is none.

The Court: Have you got a machine that will work?

Mr. Biggs: We have got a machine.

The Court: Have you got a machine that will show it accurately?

Mr. Biggs: I don't think there is any made. Is there? All the stereoscopes in this area distort it a little bit to a minor distortion.

The Court: Can you look at the pictures without a machine?

Mr. Dezendorf: It's exactly the same thing, only to apply the machine to—— [125]

The Court: Well, knowing of the distortion I am going to look at it anyway.

Mr. Biggs: Yes. I think it would be helpful to give some idea of the ravine.

Mr. Dezendorf: That raises another question which we might consider.

The Court: Go ahead.

Mr. Dezendorf: And that is in that event—in the event the Court does look at it no matter how you discount it an appellate court would not be in a position to take a similar view or make any dis-

count because the machine, apparently, is not going to be introduced or to accompany the exhibit.

The Court: Well, they can rent a machine down there.

Mr. Biggs: We will make that one available.

Mr. Dezendorf: Well, I still object on that ground.

The Court: All right. I have noted your objection.

Mr. Biggs: And 76?

The Court: What is it?

Mr. Biggs: You haven't got that on there. Those are harvesting permits.

Mr. Husband: Yes, he has.

Mr. Biggs: Oh. He has? Harvesting permits in addition to those you offered yesterday.

Mr. Dezendorf: I haven't seen them. I would like to see them if I may. [126]

Mr. Biggs: Surely.

Mr. Dezendorf: Mr. Biggs, I notice that the second one in here says that U. S. Plywood is the owner of the land. Do you think it's applicable to this?

Mr. Biggs: 53?

Mr. Dezendorf: It says U. S. Plywood is the owner of the land.

The Court: They are not going to claim ownership by reason of that permit.

Mr. Dezendorf: These have long descriptions in them. I wonder if we could have a little time to check them?

The Court: You check them during the noon hour.

Mr. Dezendorf: May we reserve our objection on them?

The Court: Oh, yes.

(At this point all exhibits mentioned above were received in evidence except those to which Mr. Dezendorf noted an objection.)

Mr. Biggs: Now, if the Court please, we will call Mr. Sanders to the stand. [127]

PAUL SANDERS

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Will you state your full name?

A. Paul M. Sanders.

Q. Where do you reside, Mr. Sanders?

A. Portland, Oregon.

Q. What is your occupation?

A. Consulting Forester.

Q. How long have you been engaged in that occupation?

A. I have been engaged as a Consulting Forester since July of 1954.

Q. What is——

The Court: Didn't you testify before me last week?

(Testimony of Paul Sanders.)

The Witness: Two weeks ago, sir.

The Court: He was one of those fancy foresters that I was telling you about.

Mr. Biggs: He was hurt that you didn't refer to him as high-priced, your Honor.

Q. What is a Consulting Forester, Mr. Sanders?

A. A professional forester available to clients for projects.

Q. And what does that include, all phases of forestry?

A. The general term would include all phases of forestry, sir. [128] Each Consulting Forester will tend to specialize in different fields.

Q. What field or fields have you specialized in, particularly, if any?

A. Well, my primary field is a Consulting Forester and as a professional forester retained by various companies on salaried jobs through the years. The field primarily has had to do with inventory of forest land, management of forest properties of old-growth, young-growth, and reproduction lands and appraisals thereof.

Q. What is your educational background, Mr. Sanders?

A. Graduate of the College of Forestry of the University of Washington.

Q. What year? A. 1939.

Q. And you have been actively engaged as a Consulting Forester at all times since then?

A. Not as a Consulting Forester. As a professional forester. Until July of 1954 I worked for

(Testimony of Paul Sanders.)

various companies and organizations as a professional forester.

Q. At the present time you maintain your own office? A. That's right.

Q. Operating independently, is that correct?

A. That's right.

Q. Did you at the request of the United States Plywood make [129] a cruise of the property in question, a stump cruise of the Seaver tract?

A. I did, sir.

Q. In that connection did you go over the entire area?

A. I personally was over the entire area. I was not personally on all of the strip and sample measurements on the stump cruise. The job was done under my personal supervision and instruction, and part of it I was on personally myself. But I have been over the Seaver property, yes.

Q. And was that cruise made jointly with Mr. Jones? A. It was.

Q. Who was retained by the plaintiff in this case; is that correct?

A. That's my understanding, yes..

Q. From data obtained from your observations or from the observations of your crew who reported to you, have you made various maps and charts of the area for use in the trial of this case, Mr. Sanders? A. Yes, we have, sir.

Q. I will ask you to examine Exhibit 52 and state if that is a map prepared under your supervision?

(Testimony of Paul Sanders.)

A. This is a map prepared under my supervision and direction, Mr. Biggs. This map—the basic information for this map does not come directly from the joint stump cruise. This is based on the—this is a map showing the forest cover prior to [130] any cuttings on the property.

Q. And based upon what information?

A. Based upon aerial photographs that were taken in 1949.

Q. Just briefly, what does the map purport to show? You state “Forest Cover Before Cutting.” Does that mean the types and species of timber and the relative location of them?

A. Yes, sir.

Q. Is it a contour map?

A. No, sir.

Q. Now, Mr. Sanders, are you familiar with Exhibit 75, being a stereoscopic picture, aerial photograph, of the Seaver tract?

A. Yes, sir.

Q. By whom was that prepared?

A. The stereoscopic exhibit was prepared by H. G. Chickering, Consulting Photogrammetrist.

Q. Of Eugene?

A. Of Eugene, yes.

Q. Is the area shown on the stereoscopic picture the same area as the area shown on your map, Exhibit 52?

A. Yes, it is.

Mr. Biggs: Now, I would like to ask the Court to examine the stereoscopic map.

And I would like, if possible, to have you, while he is examining that, relate features on the stereographic map to the flat map. It will be in the nature of a kind of a [131] commentary. We can't see the stereoscopic map because only one person can look

(Testimony of Paul Sanders.)

through it at a time. Maybe you would rather look through it.

The Witness: I think I might suggest that the Judge could look at it through the stereoscope and then we could discuss it.

The Court: I am willing.

Mr. Dezendorf: You understand it's subject to my objection.

The Court: The map isn't, but just the use of the machine.

Mr. Dezendorf: That's correct. The map is identical to Exhibit 3, which is already in.

The Court: All right.

Mr. Biggs: Now, the object is as long as this thing is down you have the two pictures in focus and you can move it back and forth to cover it. It's the area marked out in yellow. That is the Seaver tract. You will be looking at that through both of these lenses (indicating).

The Witness: I would suggest you leave your glasses on. That's the easiest way.

Mr. Biggs: It will take a few seconds to get used to it before these things come up. It will take just a minute to adjust your eyes.

(At this point discussion was held off the record regarding the viewing of the map.) [132]

The Court: It is exaggerated.

Mr. Biggs: Yes.

Mr. Dezendorf: Quite a little.

The Court: Do you have a contour map here, a

(Testimony of Paul Sanders.)

flat contour map? I think I am going to strike this exhibit.

Mr. Biggs: Mark that as 74 and would you note that?

The Clerk: 77, wouldn't it be?

Mr. Biggs: 77.

(At this point a contour map was marked for Identification as Defendant's Exhibit 77.)

Mr. Biggs: Put the map on the easel and tell the Court about it. Any objection to this going in evidence?

Mr. Dezendorf: None.

Mr. Biggs: If you could bring that right out there where the Court could see it——

The Court: Where all of us can see it.

Mr. Biggs: Yes, where everybody can see it. Now, if you will stand on this side with the pointer, Mr. Sanders, and if you will just describe, point out the lines and the area, what the color stands for and tell the Court as accurately as you can what the general topograph of the country is.

The Court: Let Mr. Jones sit in the jury box if he wants to. You have got a better view. Anybody else who wants to go over there may. All right. Go ahead. [133]

Q. (By Mr. Biggs): I notice it's colored. What do the colors stand for, first?

A. The colors represent the various classifications of vegetative cover on the ground. As I mentioned in answer to one of your questions, Mr.

(Testimony of Paul Sanders.)

Biggs, the map—the detail as to the cover—forest cover, vegetative cover on the ground, was taken from aerial photographs which were taken in 1949, before any logging occurred.

The forest cover detail is an interpretation from those aerial photographs.

Q. To what extent was it confirmed by observation in reference with the crews?

A. It was of no more—minor in detail that you would expect on ground check. It conformed very closely to what we saw on the stump cruise.

The red areas—this color (indicating) would show on the map—were areas that were predominantly, almost exclusively old-growth timber, stands of old-growth timber, old-growth Douglas Fir. The blue areas—plain blue with no cross-hatch over them—are areas that are predominantly second-growth Douglas Fir.

Q. If there is cross-hatching in there, it's not obvious from where I am, Mr. Sanders. Point it out.

A. Well, I will point out the areas that were primarily, exclusively second-growth Douglas Fir stands. This area through [134] here is a solid blue, no cross-hatching (indicating).

The Court: What does the cross-hatching mean?

Mr. Biggs: Mixed, intermingled. Excuse me.

Q. Explain that next one. What is cross-hatching?

A. I talked about solid old-growth stands, solid

(Testimony of Paul Sanders.)

second-growth stands and then a mixture of second-growth with old-growth.

The Court: All right.

The Witness: So the blue areas that show up are either pure stands of second-growth or stands of second growth with mixtures of old-growth fir therein. And the areas that have the mixtures of fir show in the cross-hatch.

One of the corrections that would be made to this map, based upon the field study—we made no attempt to make this other than an interpretation from the aerial photos—but one of the corrections would be that this drainage creek here that shows as a mixture of second-growth with scattered old-growth is very predominantly old-growth, should probably be more truly colored in this red.

Now, that's a type of thing that has to be checked on the ground in an aerial photo interpretation.

The green areas classified as reproduction, that would be young trees up to, oh, 10, 20, 25 years old; seedlings and also small second-growth which at the time the aerial photo was taken was about 30 years old. So the green areas is stuff [135] an inch high to small second-growth up to about 40 years old. That is this color here (indicating). Generally on the ridge tops and running some down the side slopes.

The brown areas are classified generally as hardwood. There will be mixtures of alder and maple, primarily.

The yellow color, the brindle, is grass, brush and fields, primarily the bottom pastureland.

(Testimony of Paul Sanders.)

Q. (By Mr. Biggs): How much land is there on the whole tract, Mr. Sanders?

A. It shows in the exhibit. 413 acres, I believe, is the figure. 413-point-something.

Q. How much of that is meadow and how much of it is fir and hemlock timber?

A. I have that acreage tabulated in one of your exhibits. I'd much rather refresh my mind from that, if I may.

The Court: Do you want to interrogate him about the map, Mr. Dezendorf, or do you want to do it later?

Mr. Dezendorf: Later.

The Court: All right. Go ahead.

Q. (By Mr. Biggs): Now, if you can point out generally to the Court on that the topography of the area——

A. The main—this whole area lays on, generally, the divide between the Siuslaw River, which is up here (indicating) and the Smith River, which is way down here (indicating).

The Court: "Up here" refers to Siuslaw, being north? [136]

The Witness: Yes. This being north (indicating) and this is south (indicating). This main drainage, for instance, which heads here.

Q. (By Mr. Biggs): Now, you are indicating the east side of the map. If you will use directions, it will help.

A. Just where I am pointing, Mr. Biggs, on the east side of the map (indicating).

(Testimony of Paul Sanders.)

Q. East side of the tract. The point is, a record is being made of this and "here" and "there" don't mean much to the record.

The Court: I know it is north when you point up, but the Court of Appeals might not know.

The Witness: This stream that runs generally east—through the east here of 40's on the property is running north along the direction of my pointing and—oh, pardon me. Let me start over again. This stream I am talking about that runs through the east here of 40's starts at the north end of the property and is draining southerly. It goes out to the north fork of the Smith River, which flows southwesterly into the Smith River as does also this stream about—approximately through the center of the property. And this stream also here.

Q. (By Mr. Biggs): Coming in generally from the northwest of the property?

A. Coming in generally from the northwest. Then to the—[137] from the north edge of the property is the divide between the Siuslaw River to the north and the Smith River to the south.

Actually, the property itself is on the divide, but the streams that head in the property generally trace—drain to the south towards the Smith River with the Siuslaw drainage starting at the north edge of the tract.

The topography within the tract is characterized by this being primary bottom approximately in the center of the tract running east and west, which

(Testimony of Paul Sanders.)

was the grazing and pastureland that has been referred to.

Q. That's the yellow area?

A. That is the yellow area on the map. And by fairly short side streams generally running north and south, either from north to south or from south to north, and draining into the middle of the property.

The slopes up from the side streams are quite steep, fairly short, but the elevations will range from 1000 feet, which is approximately the elevation here in the field according to the contour map—approximately 1000 feet up to about 1500 feet at the top of these ridges (indicating).

The streams, as I say, run generally north and south through the property. This drainage here (indicating), another side stream here running north and south, another one here coming in from the northwest and running south. And then from the south edge of the property running north there are [138] short streams that drain in towards the center of the property.

Now, between each of these streams there are ridges such as indicated on the map here, this being a ridge (indicating).

Q. You can't say "here." It doesn't mean anything. Indicating on the map from where?

A. It's predom—

Q. From the center of the—

A. The predominant ridge starts in the center of Section 31 and runs generally southerly approximately down the north-south center line of

(Testimony of Paul Sanders.)

the section about two, three hundred feet west of the north-south center line of the section, this ridge (indicating) that starts at the center of Section 31.

Q. So that aside from the meadowland, just generally speaking, the topography is canyons and ridges, is that correct? A. That is correct.

Q. Yes.

A. With short, steep slopes; typical coast country topography.

The Court: And is there a considerable amount of timber on the ridges and slopes?

The Witness: The bulk of the timber is on the lower slopes and in the bottoms, but the ridges as shown—indicated by the colors on the map, your brown and your green colors being reproduction-size timber or hardwoods and brush and they [139] are generally on the ridges or on the upper slopes.

The Court: Where is the old-Growth timber generally?

The Witness: Generally, this piece (indicating).

Mr. Biggs: The Court means by topography reference.

The Witness: In reference to topography, mainly in the bottoms.

The Court: And the second-growth?

The Witness: Some in the bottoms but also running up the side slopes. That pattern develops, of course, as a result of the old fire history through this particular area and generally through the coast country.

(Testimony of Paul Sanders.)

Q. (By Mr. Biggs): What is that? Just amplify it a little bit so that we will get it clear in mind.

A. In this particular area the fire from which this blue—the stands on the blue area, the second-growth stands, started or after which the stands started, that fire must have occurred, oh, 80 to 90 years ago. The second-growth stands are generally 70 to 75 or a little—70 to 75 years old.

A fire went through the country at that time, burned off pretty clean the areas that show on the map as pure second growth. Areas on the map that show mixtures of second-growth and old-growth, the fire was lighter. It skipped—maybe skipped a patch of a dozen old-growth trees or skipped a tree here and a tree there of the old-growth. And the areas that show now as old-growth timber would have been almost [139A] entirely skipped by the fire. They were down in the bottom and the fire would skip from one ridge to the other and leave a pocket of old-growth in the bottom.

Then the seed from the old-growth trees that were left after the fire restocked the burned area and from that grew our present 70 to 75-year-old second-growth stand.

There have also been other fires in the area from which result these younger second-growth and reproduction stands.

Q. Would you tell the Court just briefly, Mr. Sanders, how a fire stand replenishes itself or how

(Testimony of Paul Sanders.)

it grows with reference to location of second-growth stands to old-growth stands, and so on?

A. The primary thing, I think, within the term we are talking as far as the Douglas Fir stand is concerned——

Mr. Biggs: Take the witness stand.

(Whereupon the witness did as requested.)

The Witness: ——is that a Douglas Fir stand is even-aged. Generally a Douglas Fir tree will not grow within its own shade. In other words, within an existing stand of Douglas Fir, a well-stocked stand, there will not be young trees coming up underneath young Douglas Fir. For a fir stand to get established it is the general rule and it applies in this area—for a fir stand to become established it is required that the ground be fairly well cleaned of trees, either through an old fire, [140] through logging, windfall, or something that pretty generally removes the stand of timber.

Then from adjacent seed sources seed comes into that essentially bare ground and you have a stand of Douglas Fir that starts that is practically all of the same age. That process of seed-getting on the land and germinating and the trees starting in a particular area may spread over, oh, ten years. But by the time the stand gets to be 70, 80 years old, such as what we are talking about, the difference in age is insignificant. Essentially you have got an even-aged homogeneous stand of timber.

Q. Even though the sizes of trees within that stand may vary?

(Testimony of Paul Sanders.)

A. The sizes of the trees may vary greatly, whereas the age may be exactly the same.

Q. Why is that?

A. Because of the characteristics of trees growing in an even-aged stand whereby you have some trees that are dominants, dominant trees which, through inherent characteristics or through the particular spot on the ground they happen to be located, are able to grow taller and faster, reach up and get more of the light and get a greater share of the water that is available. And they grow to be bigger trees. The biggest trees. And then you have co-dominants and intermediate trees that are about the average and you have suppressed trees [141] that for some reason or other were not able to grow quite so fast and got left behind.

Q. So, while fir timber ordinarily grows an even-aged stand, it has considerable variation among the trees as to the dimension and size; is that correct?

A. Yes.

Q. All right. Now, when you spoke of intermingled second-growth and old-growth as shown on the map——

A. Uh-huh.

Q. —how is that explained by what you just said, that second-growth doesn't grow with old-growth?

A. Well, your Douglas Fir will not reproduce and grow under a solid stand of Douglas Fir or any other timber where it's a solid stand to the extent that the ground is pretty well shaded. The type of mingling that I referred to here and existed on

(Testimony of Paul Sanders.)

this property resulted from the fact that the fire that went through that country would burn clean a patch as big as half this room and then it might—in a little minor depression might—in the ground might skip another patch of about the same size of old-growth. Actually, within that little clump of old-growth you wouldn't have reproduction coming up underneath but along the edges of it where the fire did clean the ground you would have the young trees coming in and growing up to be second-growth.

Q. That's what, then, was the situation on the slopes where [142] you have shown on your map intermingled old-growth and second-growth; is that correct?

A. That is correct.

Q. Now, when timber is harvested in a tract comparable to this and in accordance with the best forestry practices—I am speaking of fir timber—what method of logging is used with respect to how the area is cleaned, if it is logged spot by spot or tract by tract, or is it selective in that particular trees are taken out of the particular areas and other trees left in those same areas?

Mr. Dezendorf: I think I would have to object to that unless it is just a general observation that has no reference to this property. Because we don't as yet and, perhaps, may never have any accurate information as to how this property was logged with respect to dates that are precise enough to be of too much help.

Mr. Biggs. I have asked that particular ques-

(Testimony of Paul Sanders.)

tion based on the provisions of the contract which require the purchaser of the timber to cut it or harvest the timber in accordance with the best forestry practices. So I am asking now from this witness as an expert his opinion as to what the best forestry practices were. And I will limit that from 1942 on to the present time.

The Witness: Yes.

The Court: All right. The objection is overruled. [143]

The Witness: In a tract of this general nature, particularly with the topography that was involved, and particularly in 1942, the common standard and best practice, method of logging such an area would be by high-lead cable systems of logging, which is essentially a—the proper system—let me start over.

The high-lead system of logging is basically a system under which the particular area being logged is clear-cut. In other words, cables go out, pull in the logs, and anything that is standing——

Q. (By Mr. Biggs): Go out from what? Go out from what?

A. Go out from the spar tree located, say, on the road. Lead out from the spar tree and then the logs are pulled in to the spar tree by cable system by powered machinery, donkey engines located on the road. Under that system all trees—it's a common practice to fall all trees on the particular setting that is being logged to a particular loading point.

Q. Regardless of size and dimension?

(Testimony of Paul Sanders.)

A. Generally so. I was going to add to that the fact that some trees at a particular time may not be felled particularly because they are—because of size or some other reason. But those trees in a high-lead logging would expect to be knocked down in the logging through the action of the cable yarding. What isn't felled gets knocked down.

Q. Just generally, let's take an average strip. How large [144] an area are we talking about on a spar pole setting—on one spar-pole setting?

A. Well, an average economic and practical yarding distance; that is, the yarding—the distance from the spar tree to the back end of the setting, the maximum distance that a log will be yarded in would be anywhere from 800 to 1,000 feet. The endeavor, of course, is to log as big an area as is practical consistent with the topography and the timber types, as much of an area to a single setting where the spar tree is rigged at considerable expense as is possible.

So the ideal situation, which is very seldom attained—but the ideal system a logging engineer is always looking for is the situation where he can set up his spar tree at a good landing, a place where logs can be conveniently handled and loaded on trucks where he has a perfect circle around that setting from which he can draw the perfect timber.

Q. Of 800 to 1,000 feet?

A. Yarding distance, yes.

Q. What? A. Yes. That's correct.

(Testimony of Paul Sanders.)

Q. Yes. Then as to the trees that aren't actually felled by the fallers, how are they disposed of? You say they are knocked down in the logging?

A. Many trees in high-lead logging, for one reason or another—more so in earlier trees than later trees—but the trees that [145] are knocked down and not taken to the—not hauled out of the woods—are left on the ground

Q. Now, what is required in good forestry practice with respect to cleaning up the area that has been logged out, cleaning it up with respect to debris and snags, and so on?

A. The State law requires—and it is also generally good forestry practice on clear-cut logging—requires annual burning of the slash, all the debris, residual material, that is left on the ground after logging. Requires the burning of the slash.

Q. Well, if a small tree not felled or not otherwise knocked down remains, is it good practice to cut that tree down so that it can be dried out and burned with the slash?

A. In high-lead logging it may not be the best practice if it could be avoided. But the practice, of course, is conditioned by practical conditions. And in high-lead logging it is extremely difficult to avoid knocking down the type of tree we are talking about.

The Court: Isn't that the old practice they used to call busheling?

The Witness: Busheling refers to contract falling.

(Testimony of Paul Sanders.)

The Court: And that's where—and when they did busheling, because they did it economically, as cheaply as they could, they used to use a high lead and knock out all the small trees. Wasn't that the basis for the legislation and [146] the suggested forest practices which would save the small trees?

Mr. Biggs: I was going to come to that. Go ahead. Answer the question of the judge.

The Witness: I think, your Honor, that that description would more particularly fit the pine area where you have an uneven-aged stand within a small area, a quarter of an acre. You will have little trees that are just starting and old-growth trees three, four hundred years old, and everything in between. And the topography conditions, the nature of the stand, are such that your pine logging is, by the nature of it—by the nature of the topography and the stand, the pine logging is essentially a tree-selection system. And the topography lends itself to that because the area can be logged with wheeled vehicles.

In the old days a horse and a—high-wheeled carts were seen. Now Cats are used.

But the Conservation Act that you refer to in the pine area specifically provides that trees below, I believe it is, 16 inches in diameter be left. In the Douglas Fir region, in recognition of the fact that fir is an even-aged stand, because of that and because of the topography, high-lead logging is commonly accepted as the practice.

The Conservation Act basically—it has alterna-

(Testimony of Paul Sanders.)

tives—but basically provided for provision for seed source by [147] leaving uncut a percentage of a 40. In other words, leaving a portion of the stand within each area uncut rather than individual trees.

Now, you do have certainly many situations in a fir forest where, because of the topography and the nature of the timber the ground is logged by tractors—and under some conditions—where under certain circumstances where just a part of the stand will be taken out.

For some reason it is practical to leave individual seed trees, much as in pine. But the basic system in Western Oregon, and it would apply certainly in an area such as this, is to provide for the Conservation Act requirements of leaving a seed source by leaving an uncut portion of the stand.

The Court: I think you testified previously that there is no minimum as far as fir is concerned.

The Witness: That is right.

The Court: It's only in the pine that there is a minimum?

The Witness: A diameter limit. The minimums in the fir refer to a percentage of the area that has to be left uncut. In addition to that, where seed trees do fit in fir practice there are specifications on the seed trees in the fir which have changed a good deal. I couldn't quote them now. Essentially, it is the endeavor in the Act to insure that a tree, and the fir that is left as a seed tree, is

(Testimony of Paul Sanders.)

honestly capable of producing seed. It calls for a tree of a certain size and [148] a certain height and percentage of ground, something that is capable of actually producing seed.

But it's not the strict diameter limit that is the basis for the Pine Conservation Act.

Mr. Biggs: Would you say, generally, then, in the fir area after a tract has been logged in accordance with good forestry practice, you have clean areas—perfectly clean with nothing on them with, then, some seed or reforestry sections which have been untouched completely?

A. That is the normal situation, yes.

Q. A small percentage of that tract left untouched will reseed the whole area if the whole area is clean and available to reseed seed; is that correct?

A. That is correct.

Q. But if in the fir area you left particular trees in a stand for seeding, the young stuff wouldn't grow up in that stand, anyway, as I understand it, in a fir area—wouldn't grow up within the stand that's already established?

A. Well, it would depend on how many trees were left.

Q. Yes. All right. Was this an area that was adapted to high-lead logging or to tractor logging in the main, Mr. Sanders?

A. In the main, high-lead logging.

Mr. Biggs: If the Court please, I have much other data that at some time in the case I would want to put in through this witness. But at this

time I intended to show just as far [149] as we have gone to give your Honor a little background of the area.

I would like now to withdraw him and with the privilege of——

The Court: You can do anything you want.

Mr. Biggs: ——recalling him at a later time.

The Court: Do you want to withhold cross-examination?

Mr. Dezendorf: I think it would be productive in some saving of time.

Mr. Biggs: All right. I want to accommodate some other witnesses, if the Court please.

(Witness temporarily excused.)

Mr. Biggs: Mr. Warlick, will you take the [150] stand?

MARVIN T. WARLICK

produced as a witness in behalf of the Defendant, being first duly sworn by the Clerk, was examined and testified as follows:

Mr. Biggs: If you will take the witness stand, Mr. Warlick.

Direct Examination

By Mr. Biggs:

The Court: Off the record.

(Discussion held off record.)

Q. (By Mr. Biggs): Will you state your residence, Mr. Warlick?

A. At the moment I am living at Portland.

(Testimony of Marvin T. Warlick.)

Q. How long have you lived in Portland?

A. Since August—the last of August, last year.

Q. What is your occupation presently?

A. Present time I am Deputy Real Estate Commissioner, State of Oregon.

Q. State of Oregon? A. Yes.

Q. How long have you held that office?

A. Since the last of August.

Q. Your home prior to your accepting the appointment in Portland was in Eugene, Oregon, was it? A. Eugene, Oregon.

Q. How long were you a resident of Lane County before you [151] moved to Portland, Mr. Warlick?

A. From October, 1930, until August, last year.

Q. What has been your occupation during those years in the main?

A. Fifteen and a half years, beginning with '31, I was Business Manager of the Eugene Hospital and Clinic. Then in '46, I believe it was, I went into the wholesale lumber business for myself.

Q. How long were you in the wholesale lumber business?

A. At the present date I am still interested in it.

Q. Yes. Prior to your actually going into the wholesale lumber business, had you done a little dealing in timber in Lane County?

A. Oh, yes.

Q. Now, Mr. Warlick, are you the Marvin T.

(Testimony of Marvin T. Warlick.)

Warlick who was a party to a contract which has been identified in this case as Plaintiff's Exhibit No. 1, the contract between Marvin T. Warlick and Thelma Warlick and Siuslaw Forest Timber Products Company—— A. We had——

Q. ——for the sale of some timber to——

A. Yes. We entered into such a contract.

Q. Pardon?

A. We did enter into such a contract.

Q. You heard the testimony of Mr. Sanders who just preceded [152] you on the stand?

A. I did.

Q. With respect to a certain tract of land which was referred to here in the record as the Seaver Tract, was it that land from—which you owned in 1942? A. That's right.

Q. When had you acquired that land, Mr. Warlick?

A. It seems to me that I acquired it in 1935.

Q. Yes. For what use—what use did you make of it? For what purpose did you acquire it?

A. I bought it primarily as a retreat for my family. We were advised to come from Texas here by the doctors on account of my wife's health, and they insisted that I get her in a very quiet, preferably a damp climate, and away from anything that we would call excitement. And I bought the place for that purpose.

Q. What can you say generally about the remoteness and inaccessibility of the area?

A. It was extremely remote when I bought it.

(Testimony of Marvin T. Warlick.)

It was necessary to cross the river at Florence and go around by—oh, I forget the little place. Anyhow, up Fiddle Creek and over Sunset Mountain and down to Sweet Creek, and then from that over in there about 40 or 50 miles of one-way mountain road.

Q. How far, actually, does the land lie from Mapleton, and in what direction? [153]

A. I think it was 12 miles, if I am not mistaken. About 12 miles.

Q. As the crow flies, that is? A. Right.

Q. You held that land, then, from '35 until 1942? A. I believe that's right, yes.

Q. You heard Mr. Sanders' testimony with respect to the forest cover on the place. Does that conform generally to your observation?

A. Right.

Q. Were you thoroughly familiar with the tract by 1942; I mean, have you been to every part of the tract?

A. Yes. I had had occasion several different times to go through every bit of it.

Q. Was there any cedar, to your knowledge, on that tract at all?

Mr. Dezendorf: Well, just a minute.

Mr. Biggs: I don't know about that. I don't care about that.

Mr. Dezendorf: It's admitted in the case that a certain amount of cedar was cut.

Mr. Biggs: I withdraw that.

Q. In 1942 did you sell the timber on this property by the contract that you have identified here,

(Testimony of Marvin T. Warlick.)

Exhibit No. 1? A. I did. [154]

Q. To whom did you sell that, Mr. Warlick?

A. Well, without looking at the contract, it was—I think it was Mr. Gonyea.

Q. Well, it's Siuslaw Forest Products?

A. Now, I don't know whether it was the company or Mr. Gonyea in person.

Q. Tell me, if you will, with whom you negotiated that purchase? A. Sherman Davidson.

Q. Who is Mr. Davidson? When did you become acquainted with him?

A. I became acquainted with Mr. Davidson when he first came into the Mapleton area with the idea of putting up a mill. At that particular time my work at the hospital was getting hospital contracts. In other words, an agreement whereby for so much per month we provided hospitalization for employees.

I met Mr. Davidson before the mill was built and secured a contract from him for the operation.

Q. Yes.

A. And we became friends over the years since then.

Q. And do you know at that time whether he was acquiring—or what areas he was acquiring timber in?

A. Well, at the time I first approached him he was not particularly anxious to buy timber anywhere. They had acquired the holdings there some—as I remember it, about 50,000 acres [155] that

(Testimony of Marvin T. Warlick.)

they had acquired when they started to build the mill.

Q. Now, when you say "they," do you refer to others than Mr. Davidson?

A. Well, I think he was associated with other men, like Mr. Gonyea, and one or two others. I can't recall their names right now. It was the Siuslaw Forest Products Company.

Q. They had organized the Siuslaw Forest Products Company? A. Yes.

Q. And was Siuslaw Forest Products Company the company that was putting up the mill at Mapleton? A. Yes.

Q. All right. You say, then, when you became acquainted with him you didn't think he was interested in buying timber. Did you approach him with the idea of selling your timber?

A. I did.

Q. Why did you want to sell your timber, Mr.—

A. Well, there were several reasons. One of them that I—I was a little bit interested in running for Congress at that time and needed some money. I think Don remembers the occasion. And that was one of the incentives to get some money for a campaign; I thought I would sell the timber.

Another was that I had two children just ready for the University and I needed money for that purpose, also.

Q. Yes. You spoke of wanting to sell the timber. What about the land? [156]

(Testimony of Marvin T. Warlick.)

A. I did not want to sell the land. I wanted to keep that for the family to spend their summers on.

Q. Yes. And what were your negotiations with Mr. Davidson and—that finally led to the contract? What was your agreement and how did it—was it worked out?

Mr. Dezendorf: If the Court please, at this point we would have to object to any testimony which would attempt to vary the terms of the contract or to explain what might have been the intention of either this gentleman or anyone else for the reason and upon the ground that what is merchantable timber is a matter of some definiteness. The word was used in the contract. The intentions of the parties with respect to what they may have thought with respect to it are immaterial and may not be introduced because there is no ambiguity in the contract in that regard.

The Court: I am going to overrule the objection on the authority of the Oregon cases which say that the word “merchantable” is not an unambiguous term but must be construed in the light of the other provisions of the contract and the understanding of the parties.

However, I do want to say this: That last night I considered the whole question of reformation of the contract and I came to the conclusion that this might not be possible in a case of this kind even if both Mr. Warlick and the Siuslaw Forest Products Company had an understanding that the [157]

(Testimony of Marvin T. Warlick.)

Siuslaw Forest Products Company cut every tree on the tract, because intervening rights have come in. But I believe that in spite of that fact that this testimony is admissible to explain what is merchantable.

Mr. Biggs: That's right, your Honor. I had wanted to say in that connection, and I will make my position perfectly clear here, because I have considered the very thing that your Honor has in mind, it is our position, just as your Honor has expressed it, that the word "merchantability" is a word which must reflect the intention of the parties in the locality, under all of the circumstances at the time. The Court says it imports an ambiguity which justifies the admission of extrinsic evidence. Now, if there is any phase of that or any interpretation that Counsel contends for and which we can agree with, which your Honor hasn't indicated he would agree with—but if there is that which would actually frustrate the purpose of this contract and the intention of these parties and it had to be so ruled we would then most certainly request reformation to make the contract reflect the intention of the parties. And in this particular case we would contend, as the evidence already shows, that no intervening rights would be impaired thereby because they do not stand in a position of bona fide purchasers for value. The testimony now shows that both Mr. Tucker and Mr. Seaver knew that when they acquired the property that they [158]

(Testimony of Marvin T. Warlick.)

were not acquiring any timber. They were put on notice.

The Court: Well, that may be right. I don't know.

Mr. Biggs: But I mean I am reserving that thought in mind if there eventuates a serious problem about this thing from any of the language of the Supreme Court. We think not, but we certainly don't think that if our evidence is as we anticipate it to be that the purpose of the contract should be frustrated.

The Court: I want to also make it perfectly clear that when I overruled Mr. Dezendorf's objection it was no surprise to him because even prior to the time I heard any evidence or knew very much about the case I told him exactly what I was going to do.

I am going to listen to all the evidence, but I want you to preserve your record.

Mr. Dezendorf: Surely. I think perhaps I should amplify my statement a little bit in view of Counsel's statement, just to point out the reason for my objection so your Honor will be, perhaps, more fully advised.

It is our position that the word "merchantable" as used in this contract is just as definite as is old-growth, second-growth, or fir or hemlock, and that being as definite there may not be any evidence of intention of the parties with respect to what they meant when they said that.

For instance, we think the situation would be

(Testimony of Marvin T. Warlick.)

the [159] same if Mr. Warlick were asked what he meant by fir and tried to include cedar within fir, which would, obviously, not be proper. And we feel very strongly that based upon the decisions of the Supreme Court to this point that where merchantable timber is used as such and there is no ambiguity or any provision in the contract that indicates that that meant merchantable during the life of the contract, that no evidence of intention can come in to try to construe or indicate what the parties meant when they said "merchantable timber."

The Court: All right. Restate your question now.

Mr. Biggs: I have forgotten just what one I stopped on. I will, though.

The Court: You were asking him about the negotiations which led up to the consummation of the contract.

Mr. Biggs: Oh, yes.

Q. You stated, I believe, that you had met Mr. Davidson out there in connection with another business matter. Did you proposed to him the sale of your timber, Mr. Warlick? A. Yes.

Q. Now, what was his situation, then, as you learned it from him? What was his attitude toward acquiring the timber?

Mr. Dezendorf: Same objection.

The Court: So you won't have to do this all the time I am going to give you a running exception to this whole line [160] of interrogation.

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: All right.

Q. (By Mr. Biggs): Do you understand the question?

A. Well, maybe you had better ask it again.

Q. All right. You proposed the sale of the timber to Mr. Davidson, I presume, because at that time his tract—the timber that he had acquired had reached your tract; is that correct?

A. That's right.

Q. Timber that he owned bordered on your tract? A. (Witness nods head.)

Q. When you proposed it to him, what was his attitude at that time towards the acquisition of your tract, Mr. Warlick?

A. I wasn't—I might say this: I was not too familiar with the financial setup of the Siuslaw Lumber Company as to who was the head. I thought at that time Mr. Davidson was and I am not sure now but what he was at that particular time.

And when I first asked him if he would be interested in buying my timber he said, "Not at the present time because of the lack of cash"; that he would be interested in buying it at some future time, but at that particular time he would not be in a position to do so.

Q. About when was that that you first proposed this purchase to him?

A. Oh, it must have been six, seven, eight months previous to [161] the time that we actually made the deal.

(Testimony of Marvin T. Warlick.)

Q. Were there further negotiations, then, and discussions with him?

A. Oh, we talked over it many times. He and the family were over when we were in the log cabin there at week ends. They would come over and we would visit all Sunday and we talked several times about what we might do with the timber. And I kept insisting that he try to sell it for me or try to buy it.

Q. And, then, what kind of an understanding did that eventuate in, if any, Mr. Warlick?

A. Well, eventually—at first I asked him to cruise it and see how much timber there was on it. And he said he would spend some time and cruise the old timber and wasn't too particularly interested in the second growth.

Q. Yes.

A. I insisted that I wouldn't sell the old timber unless he took the second growth.

Q. Yes. Why was that?

A. Well, my experience in my hospital work—I was in these logging camps continuously every day most every week, and I saw how the small timber was knocked down and destroyed. There was no use trying to sell the old growth and keep the second because there would be no second to keep.

Q. In the process of logging old growth you figured the [162] second growth would be pretty well cleaned out anyway?

A. That's right.

Q. All right.

(Testimony of Marvin T. Warlick.)

A. After he cruised it I thought there was more timber there and I employed a cruiser and he came up with a little more timber. But still Mr. Davidson was not interested in buying it.

Finally I made him a proposition. I asked him what he would give me for the timber on the place and we—after negotiations for a number of days or weeks we then entered into the contract.

Q. What was the price that you agreed upon?

A. Well, I haven't seen that contract in twelve—

Mr. Biggs: You can take a look at it.

The Witness: 10,000 or 7,500, something like that.

Mr. Biggs: This is a copy of it I started to show to you. It's a photostated or verified copy.

Q. 7,000 is what it reflects?

A. Yes. That's right. 7,000. Right.

Q. Yes. What amount of timber did your cruise show you had on that, Mr. Warlick?

A. Well, I think there was, perhaps, two million more.

Q. Do you know what the total was as you recall it?

A. My memory was that it was around 7,500.

Q. I am not talking about the money. [163]

A. 7,000,500.

Q. Oh. Seven and a half million?

A. Seven and a half million.

Q. Seven and a half million feet. Do you know who your cruiser was?

A. Yes.

(Testimony of Marvin T. Warlick.)

Q. Who was that?

A. A friend of mine out on the Lorane Highway, Mr. Brooks, I believe his name is.

Q. Brooks? A. Yes.

Q. Did you have a copy of his cruise?

A. Oh, yes.

Q. Do you have a copy of his cruise?

A. Well, it might be in my papers. I have had no occasion to look them up.

Q. I am surprised. I assumed that a cruise had been made by Mr. Davidson from Hooker from whom we have tried to get it.

A. It was Hooker instead of Brooks. Mr. Hooker. I know right where he lives out on the Lorane Highway. And he cruised it for me.

Q. Well, have you tried to get a copy of that cruise from him since?

A. Well, he gave me two copies.

Q. And you do have a copy of it? [164]

A. Somewhere in my files, yes.

Q. If you can find it for us, you would be giving us information we have been looking all over for. Would you try to find that for us?

A. I would have to search my papers.

Mr. Dezendorf: If the Court please, I would have to move to strike the witness' recollection of what he thought the cruise showed in view of the fact that it now develops there is a document which will show which would be the best evidence. He might otherwise be misled.

Mr. Biggs: I would be very happy to do that,

(Testimony of Marvin T. Warlick.)

with the understanding that if we can't locate it we would like his testimony to stand. I will say in that connection, your Honor, I thought I had asked Mr. Warlick. I certainly asked Mr. Davidson to try to locate the old cruise. And we have been unable to locate any cruise at all on that tract. So if you can find it for us, Mr. Warlick, we would like very much to have you do it and we will be happy to reserve an exhibit number in the pretrial order.

The Court: I would like to ask him one question.

Mr. Biggs: Yes.

The Court: Did the cruise indicate the volume of old growth and second growth?

The Witness: Your Honor, as I remember it, there was some 6,000 feet of old growth—6,000,000 feet of old growth and [165] the balance of it was second growth.

Mr. Dezendorf: I would make the same objection.

The Court: All right.

Mr. Dezendorf: And request the same ruling to your Honor's question and the answer.

The Court: Well, it's understood that if the cruise is located obviously the cruise and not these statements would be the testimony that would be relevant and admissible. And I would strike the testimony of this witness with reference to his remembrance of the terms of the cruise.

Mr. Dezendorf: May I make this suggestion be-

(Testimony of Marvin T. Warlick.)

cause I think perhaps I am right? Is it not proper to strike the testimony now? Because this is the defendant's witness. So that unless they produce the written cruise the evidence is out.

Mr. Biggs: I don't know why you say that.

The Court: Where do you live? You live, Mr. Warlick, in Portland now?

The Witness: Right.

The Court: Have you completed this testimony?

Mr. Biggs: No; I have not, your Honor. No.

The Court: Are you going to go into the cruise any further?

Mr. Biggs: Oh. You mean on that subject? I have, yes. Yes, I certainly object to—— [166]

The Court: Well, I am going to take your motion to strike under advisement and we will consider it if the cruise is found.

Mr. Biggs: And I will ask the witness in open court, if the Court please, if he will be kind enough to make a search of his files in an effort to locate that?

The Witness: I will be glad to.

Mr. Biggs: And to report it to me during the progress of the trial as soon as you can find it or whether you can find it?

Q. Will you do that, Mr. Warlick?

A. Be glad to.

Q. Yes. Was the price related directly by units or otherwise to the timber purchase?

A. It was not.

Q. It was simply a negotiated price that you

(Testimony of Marvin T. Warlick.)

finally agreed upon? A. Right.

Q. Now, what was your intention with respect to the extensiveness of the timber sold; that is, the quantity of the timber sold by this contract, Mr. Warlick?

Mr. Dezendorf: I assume my objection runs——

The Court: Yes. Your objection goes to all of this witness' testimony.

Mr. Dezendorf: Yes. [167]

The Witness: My understanding was that he was buying all of the timber on the place.

Q. (By Mr. Biggs): You did not intend to reserve any timber to yourself, is that correct?

A. There was no timber reserved. And after we had decided how we would do it, I said, "What about firewood? We want firewood for the couple that I kept up there in the log house and for our own log house." And Mr. Davidson said, "If you need firewood, you are perfectly welcome to go out and get all you want. If you need a pole to fix the fence or make a chicken house or anything like that, just go ahead and help yourself."

Mr. Dezendorf: I would have to add a further objection now in view of the witness' answer, which is that the witness is attempting by this testimony to vary not only the merchantability feature or explain his intention with respect to it, but he is trying to vary the whole terms of the whole contract, which is improper.

Mr. Biggs: No. I am offering that only for the

(Testimony of Marvin T. Warlick.)

purpose of showing the state of his mind and his intention at the time, your Honor. We are not——

The Court: All right. Objection is overruled. Objection is overruled.

Q. (By Mr. Biggs): Was there any discussion with respect to the time in which the timber was to be removed, Mr. Warlick? A. Yes. [168]

Mr. Dezendorf: An additional objection there, that he is attempting to vary the terms of the contract.

Mr. Biggs: I want to show them——

Mr. Dezendorf: Additional——

Mr. Biggs: I am not trying to show that there was any difference with respect to the parties but why, if I may, the time of 25 years was given in the contract.

The Court: All right.

Q. (By Mr. Biggs): The contract provides, Mr. Warlick, that the—the Siuslaw Forest Products had 20 years within which to commence cutting and an additional five years, if necessary, to complete; a 25-year cutting contract. Now, why was that time or period determined upon?

A. I asked Mr. Davidson how soon did he think they would log it off; he said that would entirely depend on the demand of the mill and the roads—wherever they ran their roads as to when they got into it. But he said since they had a lot of timber between there and the mill they would take it first and it would probably be some time—and I insisted that it would suit me better if I had a con-

(Testimony of Marvin T. Warlick.)

tract where they would agree not to take any cutting at all for 25 years because I wanted to reserve it as a retreat for the family.

Q. You wanted the use of the timber for your purposes, but you didn't—

A. I wanted to keep it as it was, a primitive place, a very [169] beautiful place, and I wanted to keep it that way. And he reminded me, and I knew it would happen, that when they did log it, it would look like a cyclone had gone through it and everything would be in terrible shape as far as the beauty of the place was concerned. And I insisted that they take as much time as they would to log it. The longer, the better it would suit me.

Q. Now, subsequently, did you dispose of the land itself, Mr. Warlick?

A. A year, maybe 18 months later; after the boy and girl got into the University they were not able to go over on week ends or holidays, and things like that, with me and I found that I was going over alone.

Q. Going over to this tract alone?

A. Going over to the cabin, as we call it, the ranch. And so we were also wanting to buy a home. As I said, we had bought the home and needed a little more money and I decided then I would sell the land.

Q. You said a year or 18 months?

A. Yes.

Q. I believe the record shows you actually sold it within less time than that.

(Testimony of Marvin T. Warlick.)

A. I don't remember.

Q. The same year, October, '42.

A. I don't remember the exact time. It was the next summer [170] or next fall, or something like that.

Q. To whom did you sell it?

A. Sold it to the Tucker brothers from California.

Q. Do you remember the consideration?

A. I believe it was \$3,000.

Mr. Dezendorf: Well, I think the records would be the best evidence if he is working on his memory all the time.

Mr. Biggs: All right. Well, I don't know that the record shows what it is.

Mr. Dezendorf: I move it be stricken.

Mr. Biggs: I don't know that the record shows what it is.

The Court: Well, I don't think that the stamp in and of itself was evidence of what was paid—is evidence in and of itself of what was paid. And unless they do have the contract I am going to permit the witness to testify.

Mr. Dezendorf: Well, may we not add to our objection, then, that the witness' testimony is not the best evidence?

The Witness: I would say that it was either three thousand or thirty-five hundred.

The Court: Wait a minute.

Mr. Biggs: Just a minute.

The Court: What is the best evidence?

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: The best evidence is either the contract or any receipt or documents that may have been exchanged as [171] the consideration.

Q. (By Mr. Biggs): Was there a receipt, if you recall it? Do you have in your possession any record of that transaction?

A. No; I don't have any records of that transaction.

Q. At all, Mr. Warlick? It was sold to him on a contract or by deed? A. Cash.

Q. Cash. So that a deed was delivered and there was no contract, is that correct?

A. That's right.

The Court: Well, you might show him the document. It might refresh his memory.

Mr. Biggs: I have here a photostatic copy of a deed. I will ask him to examine that to refresh his memory.

Q. Does that refresh your recollection?

A. Not as to the exact amount. It says, "Ten Dollars and other valuable consideration."

Q. The stamp is \$3.50?

The Court: It's more than that.

The Witness: Four-ten.

Mr. Biggs: Oh. Four-ten. That's the only evidence that I would know of, other than the witness' own recollection, if the Court please.

The Court: Yes.

Mr. Biggs: I will ask—may I, then, again—I think [172] your Honor has ruled. Have you ruled on the question?

(Testimony of Marvin T. Warlick.)

The Court: I am going to overrule the objection and let him testify.

Mr. Biggs: Yes.

Q. Now, give us your best recollection of what you sold the land for.

A. It was either three thousand or thirty-five hundred.

Q. Yes.

A. I know there was an adjustment on the commission with a real estate man. And I don't remember whether we made the adjustment.

The Court: I think that would have to go—all right.

The Clerk: Was it marked as an exhibit, your Honor?

The Court: Are you offering it?

Mr. Biggs: I didn't have it marked, your Honor. But perhaps I had better, in view of Counsel's objection. This is a photostatic copy.

The Court: The stamps show a \$3,500 consideration.

Mr. Biggs: All right, if that's what it adds up to, I will offer it.

The Court: Did you put on the stamps that were required by law and in the correct amount?

The Witness: Yes.

The Court: Between——

Mr. Biggs: Thirty-five hundred and four thousand was [173] what the stamps showed.

The Court: Wasn't it a dollar ten a thousand?

(Testimony of Marvin T. Warlick.)

Mr. Husband: I believe there is \$4.40 worth of Revenue Stamps on there.

The Court: I thought it was \$4.10.

Mr. Biggs: That's what I thought. Might have gotten up to \$4,000, then. Any objection?

Mr. Dezendorf: Has it been offered?

The Court: Yes.

Mr. Biggs: Yes; I have offered it.

Mr. Dezendorf: No objection.

The Court: Fine. Admitted.

(At this point a photostatic copy of a document entitled Warranty Deed, dated October 29, 1942, was marked for Identification and received in evidence as Defendant's Exhibit 78.)

Q. (By Mr. Biggs): Now, you sold this to a Mr. Tucker—the land to Mr. Tucker, is that correct? A. Two brothers.

Q. Two brothers? A. Yes; two brothers.

Q. Yes. Did you tell him about your transaction with Siuslaw Forest Products in selling timber?

Mr. Dezendorf: Just a moment. I would object to that for [174] the reason and upon the ground it is not binding upon us whatever this man may have said to the Tuckers.

Mr. Biggs: I think it definitely——

The Court: Objection overruled. Because I think the testimony they are going to show is that Tucker told that to Seaver, if they can tie that up.

Mr. Biggs: Seaver has already admitted that,

(Testimony of Marvin T. Warlick.)

your Honor. He admitted on the stand yesterday that Tucker told him he acquired no timber in that property.

Mr. Dezendorf: I still hope the Court understood my objection as far as whatever this man told Tucker not being binding on us.

The Court: Oh. That's right; except that I think it's to show knowledge.

Mr. Biggs: All the way around.

The Court: Knowledge in Tucker.

Mr. Biggs: That's right.

The Court: Of his understanding, which was communicated to Seaver.

Mr. Dezendorf: There is a further reason, too, and that is that as far as we know the Tuckers are not going to be witnesses here. It's pure hearsay and it's something against which we have no right of cross-examination.

Mr. Biggs: It doesn't make any difference. Tucker is not a party to this lawsuit. [175]

You can call him if you want to. And I think we both checked with him. But the point is we are showing by this man who sold the land the representations he made to his purchaser. We show by the purchaser from the intermediate purchaser the representations that were made to him, which are consistent with the grantors. So we have, therefore, established the full chain of bounds.

The Court: All right.

Mr. Biggs: Yes. Mr. Warlick?

The Witness: I told Mr. Tucker that all the

(Testimony of Marvin T. Warlick.)

timber on the place had been sold and he was getting only the land and the buildings.

Mr. Biggs: Yes.

Q. Do you know who drafted the contract——

A. No; I don't.

Q. ——between you and Siuslaw, Mr. Warlick?

A. My memory would be that Siuslaw drafted the contract. I told him since he had experience in those things to go ahead and draw up the contract and I'd sign it.

Q. I wanted to ask you one other question: You were around here in Eugene for a good many years prior to the sale. Did you have any particular knowledge during those years of the extent of second growth fir operations, milling or logging in Lane County, speaking about the period immediately prior to '42 or the years prior to '42, Mr. Warlick? [176]

A. I—we had.

Mr. Dezendorf: Just a moment. I would have to object to that until they ask the gentleman as to whether he has knowledge. I don't think they can just start out by attempting to qualify him with a question which may be an ultimate question.

The Court: All right. Qualify him.

Mr. Biggs: Had you overruled that, your Honor?

The Court: I sustained the objection.

Mr. Biggs: Oh. You sustained it.

The Court: Mr. Warlick has testified that he bought and sold some timber; that he was connected with the Eugene Hospital dealing with these lum-

(Testimony of Marvin T. Warlick.)

ber companies and he knew what was happening to second growth when they were logging. But I didn't know whether that would fully qualify him. And I think probably that you ought to ask him a few more questions.

Mr. Biggs: Oh.

Q. Did you, yourself, actually buy and sell any second-growth tracts as such?

A. In what time, sir?

Q. Well, prior to '42.

A. No; not prior to '42.

Q. It was only after 1942 that you personally dealt in that, is that correct?

A. Right. [177]

Q. What, if any, interest did you have in timber, personal interest or experience with timber, prior to 1942 other than the ownership of your own tract of land?

A. Well, I would say none in this part of the country.

Q. Yes. You did get into some negotiation later on buying and selling other tracts of land, did you, Mr. Warlick, after 1942? A. I did.

Q. Yes. How soon after 1942 did you familiarize yourself with the nature or the uses that were being made for second growth?

A. Well, as I started to say, my work with the loggers, sawmills, and such, caused me to go back into the woods and seek these contracts with mills, loggers, and so forth.

Q. Oh, yes.

(Testimony of Marvin T. Warlick.)

The Court: What year are you talking about?

A. Since 1931. And that was my work.

Mr. Biggs: Since then?

Mr. Dezendorf: He is talking about hospital contracts, your Honor.

The Court: I know that.

The Witness: My association with——

Mr. Biggs: Yes.

The Court: Yes.

Q. (By Mr. Biggs): All right. In that connection did you [178] observe the operation, what kind of timber was being logged and manufactured in these mills?

Mr. Dezendorf: I would have to object to that for the reason and upon the ground that it's not been shown yet that he knows what a second-growth tree is or anything else.

Mr. Biggs: All right. We will stop now and ask him.

Q. Do you know what a second-growth tree is, Mr. Warlick? A. Well, I certainly do.

Q. Do you know what an old-growth tree is?

A. Yes, sir.

The Court: Well, what is a second-growth tree?

Mr. Biggs: Yes.

Q. What is a second growth?

A. A second growth normally is what we would call a tree that has come up in a burn shortly after the area has burned over. It's a tree that has very coarse grain in it and is most generally a very

(Testimony of Marvin T. Warlick.)

limby tree. The limbs are down low and the grain is very coarse.

Q. Yes. Is it sometimes referred to by any other name with respect to color?

A. Well, I don't know that the color would——

Q. Well, does red fir mean anything to you?

A. Yes; there is red fir and yellow fir.

Q. Well, would a red fir have anything to do with growth?

A. The red fir is more generally considered the second growth. [179]

Mr. Biggs: Yes.

The Court: Well, how old is the second growth as compared to the old growth?

The Witness: Second growth, I would say, would be anything from one to 90 or 100 years old.

Mr. Biggs: Yes.

Q. All right. Now, the original question was, did you observe during the years that you were calling on these mills any mills that were manufacturing second-growth timber?

Mr. Dezendorf: I would object to that.

The Court: I think you must have some other people who know about that.

Mr. Biggs: We have. You may cross-examine.

The Court: I am not denying that Mr. Warlick may be an expert, but I think you have other men who are experts—admitted experts.

Mr. Biggs: Yes.

(Testimony of Marvin T. Warlick.)

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Mr. Biggs: Yes.

(Testimony of Marvin T. Warlick.)

Cross-Examination

By Mr. Dezendorf:

Q. Mr. Warlick, did you read the contract of May 4, 1942, before you executed it?

A. Yes, sir.

Q. As a matter of fact, after you read and considered it you suggested the insertion that appears in the exhibit, did [180] you not?

The Court: This is the exhibit if you want it. Do you want the original?

Mr. Dezendorf: There is another one here. I wonder if I might have Exhibit 1 handed to the witness, please?

Q. Mr. Warlick, will you look about three-quarters of the way down the page there and find an insertion that's made there in typewriting between the ordinary lines?

The Court: Not to exceed five years. is that the one?

Mr. Dezendorf: Yes.

The Court: All right. Was that put in at your suggestion?

The Witness: Your Honor, I don't think so. I think it was in there when it was presented to me.

Q. (By Mr. Dezendorf): It was interlined in there when it was presented to you, is that correct?

A. That's my memory of it.

Q. And you don't recall any particular reason why that was put in?

(Testimony of Marvin T. Warlick.)

A. I don't know, other than the conversation that led up to the formation of the contract.

Q. But you did read the contract over pretty carefully before you signed it?

A. I would say that I looked it over. My memory is that Mr. Davidson brought it to my home and I just glanced it over [181] and I said, "Well, I think that's got everything in it," and signed it, and my wife signed it, and he handed us the check.

Q. Did you read it?

A. I didn't study it. I might have—I glanced over it.

Q. But you looked at it enough to satisfy yourselves that it conformed to your understanding with Mr. Davidson; is that correct?

A. Oh, yes. Certainly. I wouldn't have signed it if it hadn't have been approximately what we had agreed on.

Q. Now, in your discussions with Mr. Davidson, didn't you indicate to him that once they started logging you didn't want the place to be torn up very long?

A. I did.

Q. Didn't he tell you that once they started they could log it in a few months?

A. If they devoted all of their machinery and the entire cut of the mill to it.

Q. Well, did he——

A. He pointed out.

Mr. Biggs: Let him finish, if you will, please, Mr. Dezendorf.

Mr. Dezendorf: I am not trying to interrupt him.

(Testimony of Marvin T. Warlick.)

The Witness: He pointed out to me that the mill was cutting around 100,000 a day; that if they cut nothing but the logs off [182] of my place I could figure out how long it would take, but that depended altogether on market conditions and the number of hours that the mill was running. They might put on a night shift, or something like that, and cut even more.

But he did point out to me that he didn't start in at one corner of a section and take the entire section. They logged it according to the topography of the land.

Mr. Dezendorf: I would ask that the answer be stricken as not responsive.

Mr. Biggs: I don't know why that isn't responsive.

The Court: I think it is responsive, and I am going to overrule the objection.

Q. (By Mr. Dezendorf): Let me ask you the question again to see if I can get a direct answer to it, Mr. Warlick. Didn't Mr. Davidson assure you that it would take only a few months to remove the timber once they started?

A. Under the conditions that he spoke of, yes.

Mr. Dezendorf: May I ask that we get a direct answer.

The Court: Well, I don't think your question is capable of that kind of an answer. I don't think it's capable of a Yes or No answer, and I am going to rule that he has answered.

Mr. Dezendorf: If the Court please, I am trying

(Testimony of Marvin T. Warlick.)

to lay the foundation for impeachment. I don't know how I can impeach him if he doesn't answer the question.

The Court: Have you a former statement from him? [183]

Mr. Dezendorf: There is a former statement from him in the pleadings in this case which is directly contrary to what he is now testifying.

The Court: All right. Then I am going to rule that you can impeach him now with that document, if you have a document to impeach him.

Mr. Dezendorf: Very well. Let's use the original. Do you have the original pleadings?

The Court: It's an affidavit that he gave Mr. Husband.

Mr. Biggs: Do you have a copy of the affidavit?

The Witness: No. This is the contract.

Mr. Dezendorf: Well, the Court is getting the original out. I have a photocopy.

Mr. Biggs: Then may the witness see my yellow copy, your Honor?

The Court: He can see the original.

Q. (By Mr. Dezendorf): Would you please read that, Mr. Warlick, and see if that refreshes your memory?

A. I still say the same thing, sir.

Q. Well, you have read the affidavit?

A. Yes.

Mr. Dezendorf: Unfortunately, I don't have a copy to work from.

Mr. Biggs: I haven't either.

(Testimony of Marvin T. Warlick.)

The Court: Here is the original. I will admit the [184] affidavit in evidence for impeachment purposes. What are you going to mark it?

Mr. Dezendorf: I wanted to ask him a question, but I don't have a copy to work from.

(At this point a two-page photostatic document entitled Affidavit in Support of Defendant's Motion for Summary Judgment was marked for Identification and received in evidence as Plaintiff's Exhibit No. 33.)

Q. (By Mr. Dezendorf): Mr. Warlick, I guess you don't have it before you now, do you?

The Court: Yes; he has.

Q. (By Mr. Dezendorf): Do you find this on Line 24 on the first page:

"At the time negotiations first started on this timber, I was told that it would not take long to remove the logs once operations were started."

Did you make that statement?

A. I did and also the following.

Q. Was that what Mr. Davidson told you?

A. At the beginning, yes. When negotiations first started it was. And no definite time was ever discussed or agreed [185] upon.

Q. But you were assured by Mr. Davidson that once they started it wouldn't take long to finish it?

A. Mr. Davidson, that was his opinion, yes. But there was no agreement as to time or anything like that.

Q. Now, Mr. Warlick——

(Testimony of Marvin T. Warlick.)

Mr. Biggs: May I see that, please? It would be interesting to know what the document is.

Mr. Dezendorf: That was the one which was served on us as the copy of the motion.

The Court: Yes.

Mr. Biggs: Yes.

Q. (By Mr. Dezendorf): Now, Mr. Warlick, Mr. Davidson looked through the property to arrive at his own conclusion as to how much timber was there during the time that you were negotiating with him, did he not? A. Right.

Q. And he told you what his cruise was, did he not? A. Right.

Q. That was something less than 5,000,000 feet of timber, was it not?

A. I would say approximately 5,000,000. I don't remember the exact—but right around—but that was the old growth.

Mr. Biggs: I am sorry, your Honor. I was reading. May I have the answer? [186]

The Court: 5,000,000, but that was old growth?

Mr. Biggs: Yes.

Q. (By Mr. Dezendorf): As a matter of fact, Mr. Davidson told you that he wasn't interested in anything but old growth, didn't he?

A. The first time when we first talked about it, yes.

Q. And he told you—— A. That——

Q. Excuse me.

A. And that was when we discussed how long it would take to take the timber out.

(Testimony of Marvin T. Warlick.)

Q. And at the time he told you that they were only interested in second growth—first growth—in old growth he said they had no market for—no use for second growth, didn't he?

A. He said they were not cutting it at that time, not buying it.

Q. What use did you intend to make of the money that you procured in selling timber to Siuslaw Forest Products?

A. Well, there were two things—immediate things: Put my children through the University and to finance my campaign.

Q. What use did you make of the money that you got from the sale of the timber, Mr. Warlick?

A. I used it for the purpose I sold the timber for.

Mr. Dezendorf: I'm sorry. I didn't hear [187] that.

(At this point the witness' last answer was read by the Court Reporter.)

Q. (By Mr. Dezendorf): So it's your statement you used the timber to finance a campaign to run for Congress and used it to put your children through school? A. (Witness nods head.)

Q. Mr. Warlick, isn't it a fact that you used the money to buy some immediately adjacent timber? A. It is not.

Q. All right. When did you buy some immediately adjacent timber to the property that you sold?

(Testimony of Marvin T. Warlick.)

A. For the sum of \$250 within the next twelve or eighteen months I bought an adjoining place.

Q. And how big was it?

A. My memory is 430 acres.

Q. And you say you bought it for \$250?

A. Cash down.

Q. And how much was the total purchase price?

A. \$6,000.

Q. Now, when, if ever, did you sell the timber on that second piece of property to Mr. Davidson?

A. I couldn't tell you the exact time, but within one or two years after I bought it.

Q. And was that sold on a contract?

A. Yes; sold on a contract. [188]

Q. Did you sell the merchantable timber on that property to Mr. Davidson?

A. I haven't read the contract since, probably, the month after I sold it. But it's my understanding—my memory is that I sold the merchantable timber—all the timber on the place.

Q. So that so far as you are concerned, it is your present testimony, I take it, that you made the same kind of a timber sale on both the initial piece and on the second piece?

Mr. Biggs: I object to that as being very unfair, if the Court please. Counsel reaches out—

The Court: Let me hear the question again.

(At this point Mr. Dezendorf's last question to the witness was read by the Court Reporter.)

(Testimony of Marvin T. Warlick.)

Mr. Biggs: I object to that, without even showing the contract. He says he hadn't seen it since a month after he signed it.

The Court: Have you got a copy of the contract?

Mr. Dezendorf: I have.

The Court: You haven't?

Mr. Dezendorf: I have.

The Court: Yes.

Mr. Dezendorf: But I think I am entitled to test his memory in accordance, especially, with his previous questions [189] and answers. I don't have to show him everything I have in order to——

Mr. Biggs: Well, then——

Mr. Dezendorf: ——log down a foundation to impeach him.

Mr. Biggs: I am certainly going to make another objection, if the Court please. This man isn't an expert witness. I let you go ahead on a wholly irrelevant line of questioning, asking him what he did about the money. You cannot impeach a witness on impeachment on collateral matters. Counsel should know that. I object to it on that ground.

Mr. Dezendorf: Well, I, perhaps, had better wait for the Court's ruling.

The Court: I am going to sustain the objection on the ground that you can't impeach on a collateral matter.

Mr. Dezendorf: Now, out of the presence of the witness, may I make a statement to your Honor to show you why I think it is material, so that he

(Testimony of Marvin T. Warlick.)

will not be advised of the possible foundation for impeachment that I intend to lead him into?

The Court: We can do that during the recess. Take up another matter. We can take a recess now. It is 11:00 o'clock.

(At this point a recess was taken, after which the following matters were heard in the Court's chambers out of the presence of the witness presently testifying.) [190]

Mr. Dezendorf: If I may preface my remarks, I am surprised at the limit on the cross-examination that is being imposed. I am at this time attempting to test this gentleman's memory as to whether or not he is not confused with two contracts with Mr. Davidson that he entered into. And I think that I am clearly entitled to do that.

And I propose to show, if permitted to proceed, that he is in fact thinking about the second contract in connection with the testimony he is giving instead of the first one.

I propose to show, if permitted to proceed, the second contract was the one under which he sold all of the timber and in which he sold all of the timber which might mature or become merchantable during the term of the contract; whereas, the initial May 4th, 1942, contract with which we are here concerned is completely the opposite and relates only to a sale of merchantable timber.

The Court: Well, if that's the case, then, it's not an impeaching document.

(Testimony of Marvin T. Warlick.)

Mr. Biggs: Not at all.

The Court: Unless it is opened up it's not available for use, because the purpose of sealed documents is to impeach. Now, under the Oregon rules when a man says he doesn't remember the terms you may not impeach him.

Mr. Biggs: That's right. [191]

The Court: And that's the rule in the Federal Court, also.

Mr. Dezendorf: If I may revert to what questions had just been answered at the time your Honor sustained the objection, he said that he sold all of the timber in that second sale and he sold all of the timber in the first sale. Now, he isn't saying that he doesn't remember.

I am trying to follow that up to show that——

The Court: Of course, he didn't say what you said he said.

Mr. Dezendorf: Let's have it. The record is available.

The Court: All right.

Mr. Biggs: And, even so, it isn't a proper way to proceed here. You asked him: "Now, what is your best recollection of that," and then told the Court you intended to impeach him by his recollection.

The Court: Well, I recall very well what he said. He said, "I haven't seen that contract since the month after it was executed. I don't remember its terms." But he says, "I think it provided that

(Testimony of Marvin T. Warlick.)

I"—he said, "All the timber. All the merchantable timber." He used both of those words.

Mr. Biggs: That's right.

The Court: Now, I don't see how you can impeach a man under those circumstances. If you want to refresh his memory, show him the document. [192]

Mr. Biggs: That's right.

Mr. Dezendorf: Well, I still believe I am entitled, on cross-examination, to test this gentleman's memory. And I am a little more hopeful as to what those prior questions and answers of his were than your Honor seems to recall.

The Court: All right. Let's look at his answer. Let's look at the questions and the answers.

(At this point the following testimony was read by the Court Reporter:

("Q. Did you sell the merchantable timber on that property to Mr. Davidson?

("A. I haven't read the contract since, probably, the month after I sold it. But it's my understanding—my memory is that I sold the merchantable timber—all the timber on the place.

("Q. So that so far as you are concerned, it is your present testimony, I take it, that you made the same kind of a timber sale on both the initial piece and on the second piece?")

The Court: Your statement in which you attempted to recapitulate what he said was not true.

(Testimony of Marvin T. Warlick.)

Mr. Dezendorf: I said, "I take it," which is a question, [193] I believe.

The Court: No. I am going to rule that this is not an impeaching question and that under the Rules you may not use the document now. But if you desire to open up the document, then I will permit it to be marked and you can present it to him.

Mr. Husband: There are two or three things in that contract that Mr. Dezendorf hasn't mentioned and I think are of great significance in that when it talks about merchantable timber it says "and now growing." If the Court will read the first three or four lines of that contract, it says, "All merchantable, old-growth fir—old-growth fir, second growth and the hemlock."

The Court: I am not interested in the terms at all. I'm interested—this is an evidentiary matter.

Mr. Husband: So that I think—may I say something further?

The Court: Yes.

Mr. Husband: So that I think if those two contracts can be reconciled, even under Mr. Dezendorf's—

The Court: I am not interested in that. I'm just interested in the question of whether the procedure which he follows is in accordance with our Rules.

Mr. Dezendorf: Yes. Now, may I ask one further question, your Honor? [194]

Mr. Biggs: Let me just make an observation here. I may have misunderstood that as the Re-

(Testimony of Marvin T. Warlick.)

porter read it, but I understood the witness to say that it was his recollection that he did not sell all the timber the second time. What is the basis for even impeachment?

Mr. Dezendorf: He said "all the merchantable timber," right after.

The Court: First "merchantable timber," and then "all the timber."

Mr. Dezendorf: That's correct.

Mr. Biggs: That's right; which is what you are now contending the document shows.

The Court: Well, I ruled in this thing. Either you are going to show him the contract, open it up, or you are not going to pursue that line of interrogation.

Mr. Dezendorf: That's the point that led me to the question I was going to ask. Is your Honor restricting me, then, from developing any further on cross-examination with this witness his memory of the terms of the second document?

The Court: No.

Mr. Biggs: Without reference to the document.

The Court: Without.

Mr. Biggs: A witness is always entitled, if the Court please, to be shown the document if he attempts to impeach him. [195]

The Court: Only if he asks for it.

Mr. Biggs: I think it's only fair, considering it is a document he hasn't seen before.

The Court: If there is a document in existence, I think it should be shown.

(Testimony of Marvin T. Warlick.)

Mr. Biggs: That's correct.

The Court: It is precisely on that basis that I took under advisement your motion to strike, because there is a document in existence.

Mr. Dezendorf: I take it, then, that the answer to my question is that I may not pursue——

The Court: Without showing him the document, yes. You can show him the document and ask him any question you want.

Mr. Dezendorf: Very well. I guess that terminates our matter here.

The Court: We will reconvene this afternoon at the Law School.

(The following proceedings were held in the courtroom:)

The Court: Take the stand.

(At this point the witness resumed the witness stand.)

Q. (By Mr. Dezendorf): Mr. Warlick——

A. Yes, sir.

The Court: I think he is through with that document.

The Witness: I had it in my hand when I left.

Mr. Dezendorf: You are correct, your Honor.

The Court: You were through with it?

Mr. Dezendorf: Yes. You are correct.

The Court: All right.

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No. 16357

In the
United States Court of Appeals
For the Ninth Circuit

JOHN N. SEAVER, JR., *Appellant*,

vs.

UNITED STATES PLYWOOD
CORPORATION, *Appellee*.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge.

JURISDICTION

This action was brought in the Circuit Court of the State of Oregon for Lane County by plaintiff-appellant, a citizen of Oregon, against defendant-appellee, a New York corporation (R. 3). Appellant seeks to recover damages from appellee arising out of appellee's cutting and removing certain timber from lands owned by appellant (R. 3).

Appellee removed the case to the United States District Court for the District of Oregon under 62 Stat. 937 (28 U.S.C.A., Sec. 1441). The amount in controversy, exclusive of interest and costs, exceeds \$3,000.00 (R. 10).

Appellant has appealed from the final judgment of the District Court (R. 65).

The District Court acquired jurisdiction under 62 Stat. 930 (28 U.S.C.A., Sec. 1332) and 62 Stat. 937 (28 U.S.C.A., Sec. 1441). This court acquired jurisdiction under 62 Stat. 929 (28 U.S.C.A., Sec. 1291) and 62 Stat. 930 (28 U.S.C.A., Sec. 1294).

STATEMENT OF THE CASE

Appellant filed this action against appellee, for timber trespass arising out of appellee's cutting and removing certain timber from lands owned by appellant (R. 3).

Appellee claimed the right to cut this timber by virtue of a contract entered into in 1942 between appellant's predecessor in interest and appellee's predecessor in interest (R. 6-8). The trial court held that the timber cut by appellee was owned by appellee, under the provisions of the timber contract (R. 49-65), and entered judgment for appellee, except appellant was awarded judgment for \$80.00—double the value of some cedar

trees cut by appellee (R. 65). Cedar was admittedly reserved to appellant under the contract (R. 98-99).

The principal question raised on this appeal concerns the construction of the 1942 contract and, particularly, "What timber did appellee's predecessor and appellee acquire under the contract?"

On May 4, 1942, Marvin T. Warlick and his wife, the predecessors in interest of appellant, sold to Siuslaw Forest Products, Inc., the predecessor in interest of appellee, "all of the *merchantable* old growth and second growth fir and hemlock timber either standing or down and now growing or located" (emphasis supplied) on the real property described in the contract (R. 10).

In 1949 appellee's predecessor commenced logging operations on the property, and between 1949 and 1953 it removed the greater part of the old growth fir timber (Exs. 7 & 8, R. 53, 59). Subsequent to this logging activity, agents of appellee's predecessor filed with the Assessor of Lane County, Oregon, affidavits to the effect that *all* timber had been removed from the property. (Ex. 4). Thereafter appellee went back on the property covered by the complete timber removal affidavits and cut and removed substantially all of the second growth timber which had been passed over in the first cutting. (Exs. 7 & 8).

The trial court held (and in doing so refused to follow the decisions of the Oregon Supreme Court to the contrary) that appellee had the right to go back and cut the second growth timber which was not cut when the land was first logged prior to 1953 and disregarded entirely the effect of the timber removal affidavits filed after the first cutting when the old growth was removed.

The trial court clearly erred in holding appellee owned and was entitled to remove on the second cutting the second growth timber because:

1. Appellee had the right to cut, and acquired title to, only such timber on this property as was *merchantable* on the date of the contract which was May 4, 1942.

2. Under all of the evidence in this case, on May 4, 1942, the second growth timber on this property was *not* merchantable.

3. There is no evidence to support a finding that the second growth timber on this property was merchantable on May 4, 1942.

Appellant duly filed objections to proposed findings and conclusions tendered by appellee (R. 39, 48) and appealed from the judgment entered after adverse findings and conclusions were entered (R. 65).

SPECIFICATION OF ERRORS

1. The District Court erred in finding:

“The land upon which the timber in question was situated (hereinafter referred to as the Seaver tract) is in the Coastal Range near the community of Mapleton in Lane County, Oregon. The predominant species and grades of timber in that area were those described in the contract of May 4, 1942. At that time and for years prior thereto, it was the prevailing custom and practice in the area to purchase timber by the stand rather than by individual trees.”

for the reason that there is no evidence to support it and this finding is irrelevant to any issue in the case.

2. The District Court erred in finding:

“In 1942 and subsequent years, including the period during which defendant and Siuslaw cut and removed timber from the Seaver tract, customary logging practices in the fir and hemlock regions in western Oregon, including the Mapleton area, consisted of so-called high lead or donkey logging whereby specific stands being logged were logged clean, except for seed trees, in that individual trees within a particular stand which were not actually felled and bucked, were nevertheless knocked down or destroyed as a necessary incident of the logging operations. Good logging and forestry practices required that timber which was not removed from the logged area for use be burned as slash.”

for the reason there is no evidence that the old growth and second growth timber were growing in the same stands so that they had to be logged together. As a matter of fact, substantially all of the old growth was removed by itself and then the second growth timber was removed in a second cutting after complete timber removal affidavits had been filed and after its value had appreciated about 400% in the period following the first cutting of the old growth.

3. The District Court erred in finding:

“In the Mapleton area, as well as other fir-growing areas, in 1942, old growth fir produced peeler logs which were then in increasing demand in the plywood industry as well as saw logs for which there was then and for many years prior thereto had been an active and ready market. Although old growth fir was in greater demand than second growth fir, nevertheless a substantial and growing demand then existed in this area for second growth fir stands, second growth fir logs and second growth fir products, such as poles, piling and numerous manufactured products, including car decking, ties, bridge decking, studs, planks, siding and other lumber products for building and construction purposes.

“Hemlock logs, in 1942 and in years prior and subsequent thereto, were being regularly sold primarily for pulp to paper manufacturers in the State of Oregon. In 1941 and 1942 Siuslaw was engaged in logging hemlock timber on other tracts in the general vicinity of the Seaver tract and selling it for pulp to Crown Zellerbach, a paper manufacturing company.”

for the reason that said finding is not relevant to any issue in this case. The question to be answered is whether the second growth timber *on appellant's property* was merchantable on the date of the contract in 1942. Under all the evidence it was not and there was no evidence that it was.

4. The District Court erred in finding:

“At the time the parties were negotiating the timber purchase contract, Siuslaw was planning a multipurpose logging program for the utilization of its timber in the Mapleton area, not merely for saw logs but also for poles, piling, bridge decking, ties, pulp and other lumber products. It had embarked upon the construction of a logging road toward and into part of its lands adjacent to the Seaver tract. It was completing construction of a lumber mill at Mapleton for the purpose of sawing and processing logs from its timber in that area and it was interested in acquiring lands contiguous to its other holdings.

“In May of 1942 and immediately prior thereto during the negotiations between Siuslaw and Warlick for the purchase of the timber on the Seaver tract, the parties did not know when the tract would become operable because of many factors then undetermined. For instance, they did not know when the logging road would be extended to the Seaver tract or precisely in what manner or at what time the tract would be logged. These factors would be governed by future development of Siuslaw's over-all logging program. In view of these uncertainties and of Warlick's willingness that the commencement of the logging be delayed, they agreed on a relatively long period of time, that is, a total period of twenty-

five years, within which Siuslaw might cut and remove the timber from the tract.”

for the reason that it is not relevant to any issue in this case.

5. The District Court erred in finding:

“The Tuckers, who purchased the fee from Warlick, and plaintiff, who purchased the fee from the Tuckers, at all times knew of the original intention of the parties with respect to the grades, species and quantity of timber conveyed, and neither the Tuckers nor the plaintiff believed that their respective deeds to the fee vested in them any rights in any of the fir and hemlock which defendant or Siuslaw desired to remove from the tract.”

for the reason that said finding is based upon evidence which was admitted in violation of the parol evidence rule. In any event, the intention of the original parties is not binding upon this appellant. Since the contract states that only *merchantable* timber is conveyed, the parol evidence rule precludes proof of the alleged “actual” intent of the original parties.

6. The District Court erred in finding:

“The first logging on the Seaver tract was done in 1949. Logging continued each year thereafter until the end of the year 1955. More than half of the total amount of the timber described in Find-

ing No. IX was removed during the years 1949 and 1950. Only a small area was logged in 1951. In 1952 timber was felled, bucked and cold decked but was not removed therefrom until the following year. Major logging on this tract was carried on during the years 1953 and 1955. In 1954 a general strike in the logging industry caused a shutdown of the defendant's logging activities in the area with the result that a relatively small quantity of timber on the Seaver tract was logged during the year."

for the reason that the only evidence is that prior to 1953 substantially all of the old growth timber had been removed by appellee or its predecessor. It had filed affidavits with the County Assessor of Lane County that all the timber had been removed (Ex. 4). Then, in 1953, after the price of second growth timber had appreciated from a 1940 value of \$1.20 per thousand to a value of \$19.00 per thousand (R. 54), appellee and its predecessor entered the property again and began removing the second growth which had been left behind when the first logging was completed.

7. The District Court erred in finding:

"The Seaver tract was logged as a part of Siuslaw's and defendant's entire holdings in the Mapleton area at all times in a manner consistent with defendant's and Siuslaw's mill inventory requirements and other practical considerations, including the development of a main logging road and spur logging roads. Interruptions in the logging of the

Seaver tract were not intended to and did not operate as a relinquishment or abandonment by defendant or Siuslaw of any of the timber thereon."

for the reason that said finding is not relevant to any issue in this case and for the further reason that the conclusive evidence is that appellee's predecessor did intend to relinquish and abandon the property after it cut the old growth timber thereon.

8. The District Court erred in finding:

"According to the prevailing standards of merchantability in the area, all of the fir and hemlock timber removed by defendant and Siuslaw as above stated was in fact merchantable on May 4, 1942."

for the reason that there was no evidence that the second growth fir timber on appellant's property was merchantable on May 4, 1942. The only evidence in the case is that that second growth timber was not merchantable in 1942.

9. The District Court erred in finding:

"During the entire period that defendant and Siuslaw conducted logging operations upon the Seaver tract, plaintiff lived in close proximity to the tract and was personally familiar with the nature and extent of logging operations being conducted thereon. From the time in 1952 when plaintiff first

acquired his interest in this tract until the filing of this action in 1956 plaintiff did not have any objection to the severance and removal by defendant and Siuslaw of the fir and hemlock timber for which plaintiff seeks damages in this action."

for the reason that there is no evidence that the plaintiff was advised as to his rights under the contract until 1956.

10. The District Court erred in finding:

"The conduct of plaintiff and the Tuckers in requesting and obtaining reimbursement of property taxes allocable to the timber and fire patrol assessments, and in failing to protest or object to the cutting and removal of the timber during the course of the logging operations, evidences their knowledge of the intention of the original parties to the contract. Additionally, plaintiff, by entering into the logging contract referred to in paragraph X hereof and thereby agreeing that defendant was the owner of all the fir and hemlock timber on certain areas of the tract and by cutting and removing for defendant some 108,000 board feet of timber from the tract pursuant to said logging contract, evidenced not merely his consent to the removal of that timber but also his understanding that all of the other fir and hemlock timber removed by defendant had been sold to Siuslaw pursuant to the terms of the contract of May 4, 1942, as understood and construed by the parties thereto."

for the reason that the alleged intention of the parties is immaterial when the agreement is reduced to writing

and contains well-understood terms. Further, there is no evidence that appellant knew what his rights were at the time the timber was being removed.

11. The District Court erred in finding:

“Neither defendant nor Siuslaw ever relinquished or abandoned any of its rights in or to any of the fir and hemlock timber which it acquired by the contract of May 4, 1942.

“The logging affidavits filed in 1950 and 1951 by Frank McPherson (logging superintendent for Siuslaw) with the Lane County Assessor stating that all of the merchantable fir and hemlock timber had been removed from a large segment of the Seaver tract, were intended by McPherson to reflect the status of the initial timber inventory in Siuslaw’s timber depletion records. This initial inventory had been recorded without the benefit of a cruise or other accurate information as to volume and represented only an estimate of the amount of Siuslaw’s timber holdings on the Seaver tract and surrounding and adjacent tracts.

“When McPherson filed the logging affidavits, he had not personally inspected the entire Seaver tract, and was unaware of large tracts of remaining timber thereon in ravines and on ridge slopes into which spur logging roads had not yet been constructed. The terrain of these ravines and ridge slopes on which the remaining timber stood was comparable to the terrain of other portions of the Seaver tract theretofore logged by Siuslaw. McPherson made and filed the affidavits in good faith without intending to mislead or deceive the County Assessor, and the record does not establish that the Assessor was in fact misled or deceived. On the other

hand, defendant did pay taxes on the remaining timber after the McPherson affidavits were filed. McPherson was not an officer of Siuslaw or of defendant and was not authorized in preparing and filing the affidavits to relinquish, abandon or in any way prejudice his employer's title to any of the timber, and he did not intend to do so either by the filing of the logging affidavits or by his conduct in any other particular."

for the reason that there was no substantial evidence to support such a finding. As a matter of fact, the initial inventory of appellee was based on the Hooker cruise and accurately represented the amount of merchantable (old growth) timber on the property. Further, the agents of appellee's predecessor who filed the timber removal affidavits had personally inspected appellant's land and were acquainted with the amount of timber remaining thereon. Furthermore, they in fact had the authority to file the affidavits.

12. The District Court erred in finding:

"The 8,000 board feet of cedar referred to in paragraph IX hereof consisted of only five trees. It was not included in the contract of May 4, 1942, and defendant so admitted on the trial. The value of the cedar was stipulated by the parties to be \$5 per thousand board feet at the time of its severance, or a total of \$40. The circumstances surrounding the cutting and removal of the cedar do not evidence such intentional or willful wrongdoing on the part of defendant as to justify treble damages."

for the reason that the only evidence is that the cedar was willfully cut. Under the law of Oregon, treble damages must follow as a matter of law.

13. The District Court erred in finding:

“Siuslaw and defendant, in all of their respective logging operations upon the Seaver tract, cut and removed the fir and hemlock timber therefrom in a bona fide belief that they were the owners of such timber and were entitled to cut and remove the same from said tract under the terms of the contract of May 4, 1942.”

for the reason that under the law of Oregon there is no question but that appellee and its predecessor did not acquire the second growth timber which was removed on the second cutting after the complete timber removal affidavits were filed and the second growth timber was willfully and intentionally cut. Appellee's belief, bona fide or otherwise, has no effect upon the imposition of treble damages under the Oregon statutes.

14. The District Court erred in its Conclusion of Law

“I

“The cutting and removal of the cedar timber was casual and involuntary, and plaintiff is entitled to judgment against defendant in the sum of \$80, being double the value thereof.”

because there is no evidence that the cutting of the cedar was "casual and involuntary." It was willful and intentional. Therefore, treble damages follow as a matter of law.

15. The District Court erred in Conclusion of Law

"II

"The term 'merchantable' as used in relation to the timber described in the contract of May 4, 1942, in and of itself involves some ambiguity concerning the intention of the parties to the contract, requiring a consideration of the circumstances surrounding the parties at the time the contract was made and the attitude of the parties toward the subject matter subsequent to the execution of the contract. As intended, used and construed by the original parties to the contract and their successors in interest, the terms 'all of the merchantable old growth and second growth fir and hemlock timber either standing or down and now growing or located,' included all of the fir and hemlock timber cut and removed by defendant and Siuslaw."

for the reason that the term "merchantable timber" is not an ambiguous term and it has a well-understood meaning. Under all of the evidence in this case, the second growth timber on appellant's property was not merchantable on May 4, 1942.

16. The District Court erred in its Conclusion of Law

“III

“Defendant owned and was privileged to cut and remove all of the old growth and second growth fir and hemlock timber for which claim is made by plaintiff against defendant.”

for the reason that neither appellee or its predecessor was entitled, under the contract, to remove the second growth timber which was passed over in the first cutting.

17. The District Court erred in its Conclusion of Law

“IV

“Plaintiff consented to the removal by defendant and Siuslaw of all of the fir and hemlock timber for which he claims damages in this action.”

because there was no evidence to support a conclusion that appellant knowingly consented to anything.

18. The District Court erred in its Conclusion of Law

“V

“Neither the defendant nor Siuslaw intended to or did relinquish or abandon any of its rights to the timber involved.”

for the reason that the evidence is conclusive that appellee's predecessor did intend to relinquish and abandon the second growth timber. It filed the removal affidavits and its entire course of conduct is inconsistent with a conclusion that after it initially logged the old growth and filed the timber removal affidavits, it intended to retain any rights in the second growth timber.

19. The District Court erred in entering judgment for appellant in only the amount of \$80, as follows:

"The court having heretofore made and entered its Findings of Fact and Conclusions of Law herein and the case now coming on for judgment in accordance therewith, now based thereon,

"IT IS CONSIDERED, ORDERED and ADJUDGED that plaintiff have and he is hereby granted judgment against defendant for the sum of \$80. No costs."

for the reason that appellant was entitled to triple the value of all timber removed from the property in and after 1953.

20. The District Court erred in admitting testimony concerning the alleged intent of the parties at the time that the contract was negotiated (R. 210-211):

"Q. [By Mr. Biggs]: Yes. And what were your negotiations with Mr. Davidson and—that finally led to the contract? What was your agreement and how did it—was it worked out?

“Mr. Dezendorf: If the Court please, at this point we would have to object to any testimony which would attempt to vary the terms of the contract or to explain what might have been the intention of either this gentleman or anyone else for the reason and upon the ground that what is merchantable timber is a matter of some definiteness. The word was used in the contract. The intentions of the parties with respect to what they may have thought with respect to it are immaterial and may not be introduced because there is no ambiguity in the contract in that regard.

“The Court: I am going to overrule the objection on the authority of the Oregon cases which say that the word ‘merchantable’ is not an unambiguous term but must be construed in the light of the other provisions of the contract and the understanding of the parties.

“However, I do want to say this; That last night I considered the whole question of reformation of the contract and I came to the conclusion that this might not be possible in a case of this kind even if both Mr. Warlick and the Siuslaw Forest Products Company had an understanding that the Siuslaw Forest Products Company cut every tree on the tract, because intervening rights have come in. But I believe that in spite of that fact that this testimony is admissible to explain what is merchantable. * * *”

(R. 213):

“The Court: All right. Restate your question now.

“Mr. Biggs: I have forgotten just what one I stopped on. I will, though.

"The Court: You were asking him about the negotiations which led up to the consummation of the contract.

"Mr. Biggs: Oh, yes.

"Q. You stated, I believe, that you had met Mr. Davidson out there in connection with another business matter. Did you proposed [sic] to him the sale of your timber, Mr. Warlick?

"A. Yes.

"Q. Now, what was his situation, then, as you learned it from him? What was his attitude toward acquiring the timber?

"Mr. Dezendorf: Same objection.

"The Court: So you won't have to do this all the time I am going to give you a running exception to this whole line of interrogation. * * *"

(R. 220):

"Q. Now, what was your intention with respect to the extensiveness of the timber sold; that is, the quantity of the timber sold by this contract, Mr. Warlick?

"Mr. Dezendorf: I assume my objection runs—

"The Court: Yes. Your objection goes to all of this witness' testimony.

"Mr. Dezendorf: Yes.

"The Witness: My understanding was that he was buying all of the timber on the place.

"Q. (By Mr. Biggs): You did not intend to reserve any timber to yourself, is that correct?

"A. There was no timber reserved. And after we had decided how we would do it, I said, 'What about firewood? We want firewood for the couple that I kept up there in the log house and for our own log house.' And Mr. Davidson said, 'If you need firewood, you are perfectly welcome to go out and get all you want. If you need a pole to fix the fence or make a chicken house or anything like that, just go ahead and help yourself.' "

SUMMARY OF ARGUMENT

I

Under the law of Oregon, only timber which was "merchantable" on the date of the contract passed to the buyer. Timber which becomes merchantable during the life of a timber contract does not belong to the buyer and it belongs to the seller.

II

Under Oregon law only timber which has a commercial value and which can be utilized at a profit is, in fact, "merchantable."

III

All of the evidence in this case shows that the second growth timber on appellant's property was not merchantable on May 4, 1942. Appellee was a trespasser when it cut the second growth and is liable for treble damages.

IV

When appellee's predecessor passed over the second growth on the first cutting and swore to and filed with the County Assessor the timber removal affidavits, it thereby abandoned all timber then remaining on the property.

V

Under the law of Oregon, the cutting of the second growth timber was willful and without right and, consequently, appellant is entitled to recover treble damages for the cutting and removal of it.

VI

There is no evidence in this case that appellant consented to appellee's removal of the second growth timber from his property.

VII

As a matter of law, evidence of the alleged "actual" intent of appellant's and appellee's predecessors when they negotiated the 1942 contract was inadmissible.

ARGUMENT

I

Under the law of Oregon only timber which was "merchantable" on the date of the contract passed to the buyer. Timber which becomes merchantable during the life of a

timber contract does not belong to the buyer and it belongs to the seller.

In *Hughes v. Heppner Lumber Company*, 205 Or 11, 283 P2d 142, 286 P2d 126, plaintiff's predecessor deeded to defendant's predecessor "all pine and merchantable fir timber" located on certain land in eastern Oregon. One of the issues in the case was whether the defendant had the right to cut timber which had become merchantable since the date of the contract but was not merchantable at the time the contract was entered into. The Supreme Court of Oregon held that only timber which was merchantable on the date of the contract belonged to the buyer. The court said, at page 15:

"A grant of merchantable timber is a grant only of the merchantable timber on the land at the date of the contract. *Rayburn et ux. v. Crawford et ux.*, 187 Or 386, 398, 211 P2d 483."

Defendant in that case filed a petition for rehearing which was denied with a further opinion in which the court discussed at some length the subject of what merchantable timber passes under a contract or deed. The court said, at page 59:

"It is next argued that on the authority of *Monger v. Dimmick*, *supra*, defendant was not limited

to the timber that was merchantable in 1939. In that case we quoted from *Adams v. Hazen*, 123 Va 304, 96 SE 741. It has never been the law in Oregon that merchantable timber is that timber which has commercial value 'during the life of the contract.' This clause was inadvertently included in the Monger quotation."

This question was again discussed at some length in the case of *Doherty et ux. v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566 (1957), where the court said, at page 419:

"The defendant in his brief asserts that 'all merchantable timber,' as those words are used in the contract under consideration, is 'all timber—whatever its size—that had, at the date of the contract, or may have during the life of the contract, a commercial value * * *.' In support defendant cites (authorities). Defendant recognizes that its rights are limited by the 10-inch provision. We quote from defendant's brief:

"* * * The judgment permits the defendant to log merchantable pine and fir timber which will produce logs with a ten inch top from the premises until 1977, without regard to whether such timber was merchantable in 1940.'

We think neither findings nor judgment go that far, but the quoted statement clearly defines the issue.

"Plaintiffs, in addition to their claim that the contract covers only 6,701,000 feet of pine and 25,000 feet of fir, contend that the only timber covered by the contract is that which was merchantable and of the required size in 1943. Plaintiffs rely upon

Hughes v. Heppner Lumber Co., *supra*, 205 Or 11, 283 P2d 142; *Rayburn v. Crawford*, 187 Or 386, 211 P2d 483; *Parsons v. Boggie*, 139 Or 469, 11 P2d 280, and other cases later cited. At this point we find conflict, not in the contract nor the judgment of the trial court, but in the decisions of this court. Both parties cite *Tenny v. Mulvaney*, *supra*, 9 Or 405 (1881). That case does discuss the meaning of 'merchantable' but does not discuss the question of the time as of which it is to be determined.

"In *Parsons v. Boggie*, *supra* (1932), the vendor agreed to sell 'all the good merchantable timber on his land' with a right to remove it 'at any time.' In accordance with the usual rule it was held that the purchaser had only a reasonable time for removal, but the court also said of the contract:

" 'Assuming that the foregoing instrument is a grant of the "good merchantable timber" on the premises described, it is a grant only of the merchantable timber on the land at the date of contract. *Robertson v. H. Weston Lumber Co.*, 124 Miss. 606 (87 So. 120). It does not attempt to convey any timber maturing after that date.
* * *

"We next consider *Monger et ux v. Dimmick et al*, *supra*, decided in October, 1949. The contract provided that vendors 'agree to sell' all of the merchantable timber on said above described lands. Vendors sought a decree declaring the contract rescinded because of breach thereof by defendants. Among other alleged breaches was the cutting of piling by the vendees. The court found numerous breaches of contract by vendees, including the cutting of piling. We have examined the briefs on appeal and the opinion of this court and find no issue raised or discussed as to the time as of which merchantability is to be determined. Nevertheless the court in an opinion by Justice HAY said:

“ * * * For the purposes of this case, we adopt the following definition of the term:

“ “ * * * ‘all merchantable timber,’ as those words are used in the contract under consideration, is all timber—whatever its size— that had, at the date of the contract, or may have during the life of the contract, a commercial value in that locality, for the purpose of manufacture into lumber, or for any other purpose. * * * ”

“Citing *Adams v. Hazen*, 123 Va 304, 323, 96 SE 741, 746, also cited *supra*. All of the quotation from *Adams v. Hazen* was appropriate to the case except the words ‘or may have during the life of the contract,’ which were wholly irrelevant. The words ‘whatever its size’ were appropriate to that case because the contract contained no requirement as to size but only as to merchantability. Those words have no applicability in the pending case because both size and merchantability are specified.

“We next turn to *Rayburn et ux v. Crawford et ux*, decided one month after *Monger et ux v. Dimmick et al.* This opinion was also written by Justice HAY. In March 1946 the vendors contracted to sell and the vendees to buy certain lands. The parties had agreed that vendors reserved the timber but by a scrivener’s error the reservation was omitted from the contract. This court held that the contract should be reformed to accomplish the intended result. No time was specified within which the vendors might remove the timber, so the court, following *Parsons v. Boggie*, held that the reservation was for a reasonable time. It then said:

“ ‘We are of the opinion that the reservation of the merchantable timber in this case was a reservation only of that timber upon the land which was merchantable at the date of the exe-

cution of the contract. * * * 187 Or 386, 399, 211 P2d 483.

“Thus within a period of one month the court construed one contract as including timber which had ‘or may have during the life of the contract’ merchantability, and construed another contract as including only timber which was merchantable at the date of the execution of the contract. The fact that the time for removal of timber in *Monger v. Dimmick* was eight years and that the term in *Rayburn v. Crawford* was for a reasonable time constitutes in our opinion a ‘distinction without a difference.’

“The next case for consideration is *Dahl et al v. Crain et ux, supra*, 193 Or 207, 237 P2d 939 (1951). Plaintiffs as purchasers sought specific performance of a contract for the purchase from defendants of merchantable pine timber. The contract was executed in August 1946 and the term thereof ended in December 1955. Here again there was a controversy as to what was merchantable timber, but not as to the time as of which merchantability is to be determined, yet the court said:

“ * * * However, for the purposes of this case, we adopt the same definition adopted by Mr. Justice HAY in *Monger et ux v. Dimmick et al.*, 187 Or 253, 257, 210 P2d 929; to-wit:

“ “ * * * ‘all merchantable timber,’ as those words are used in the contract under consideration, is all timber—whatever its size—that had, at the date of the contract, *or may have during the life of the contract*, a commercial value in that locality, for the purpose of manufacture into lumber, *or for any other purpose.*” (Italics ours.)’ 193 Or at 225.

“Finally, we come to *Hughes v. Heppner Lumber Co.*, supra, 205 Or 11, 283 P2d 142, 286 P2d 126. In February 1939 plaintiffs deeded to the predecessor of defendant all pine and merchantable fir timber on 116 acres of land here involved. Two days later the grantee of the timber conveyed to the plaintiffs 692 acres of the land in litigation, reserving all of the pine and merchantable fir timber thereon ‘with the right to log the same at its convenience.’ The defendant succeeded to the rights in the reserved timber. This court stated the issue thus: ‘did defendant remove all the merchantable timber as contemplated by the parties in 1939, during the years 1939 to 1948, inclusive?’ The court continued:

“ ‘The parties agree on the issues, at least in respect to this question. Defendant claims and plaintiffs disclaim that the timber now contended for was merchantable timber in 1939. Defendant asserts therefore that they have a reasonable time to remove it. If the timber, however, was not merchantable at that time it follows that the “reasonable time for removal” doctrine would have no applicability.

“ ‘A grant of merchantable timber is a grant only of the merchantable timber on the land at the date of the contract. *Rayburn et ux v. Crawford et ux.*, 187 Or 386, 398, 211 P2d 483.’ 205 Or at 14.

“The defendant after 1948 ceased to log and made no claim to any remaining timber until 1951 when the price had ‘soared some 400 per cent.’ The majority of the court held that in 1951 a reasonable time for removal of the reserved timber had expired. Two judges dissented on this issue but they agreed with the majority on the time as of which merchantability and size are to be determined. From the dissent of Justice WARNER, concurred in by Justice TOOZE, we quote:

“* * * The general rule is that when standing timber of designated dimensions or to be used for designated purposes is sold, only such timber is conveyed as measures up to such dimensions or is suitable for the purposes specified *as of the date of the deed or contract of sale*. 34 Am Jur 504, Logs and Timber, § 22; 54 CJS 696, Logs and Logging, § 17b. * * *’ 205 Or at 39.

“In the opinion denying petition for rehearing the majority said:

“‘It is next argued that on the authority of *Monger v. Dimmick*, supra, defendant was not limited to the timber that was merchantable in 1939. In that case we quoted from *Adams v. Hazen*, 123 Va 304, 96 SE 741. It has never been the law in Oregon that merchantable timber is that timber which has commercial value “during the life of the contract.” This clause was inadvertently included in the *Monger* quotation. *Tenny v. Mulvaney*, 9 Or 405; *Parsons v. Boggie*, 139 Or 469, 11 P2d 280; *Rayburn et ux. v. Crawford et ux.*, 187 Or 386, 211 P2d 483.’ 205 Or at 59.

Thus the dictum in *Monger v. Dimmick* was expressly overruled and the dictum in *Dahl v. Crain*, supra, was overruled by necessary implication. The law as laid down in *Hughes v. Heppner Lumber Co.*, *Rayburn v. Crawford*, and *Parson v. Boggie*, is supported by the great weight of authority. (citations)

“In view of the history of *Monger v. Dimmick* and *Rayburn v. Crawford*, we are convinced that this court in the *Monger* case inadvertently quoted the portion of the opinion in *Adams v. Hazen* which reads ‘or may have during the life of the contract.’ The true rule was stated one month later in *Rayburn’s* case. In any event we adhere to the rule as

stated by both majority and minority of this court in *Hughes v. Heppner Lumber Co.*”

In view of this rule of law of the State of Oregon, the question in this case is: What timber on appellant's property was merchantable on May 4, 1942? Appellee and its predecessor only acquired title to the merchantable timber as of that date and none other.

II

Under Oregon law, only timber which has a commercial value and which can be utilized at a profit is, in fact, “merchantable.”

One of the questions presented in *Hughes v. Heppner Lumber Co.*, 205 Or 11, 283 P2d 142, 286 P2d 126, *supra*, was what was meant by “merchantable timber.” The Supreme Court of Oregon, in its opinion on rehearing at page 57 said:

“We are charged with error in ‘holding that the words “all pine and merchantable fir” in 1939 meant only that pine and fir which could be logged on a profitable basis.’ We did not so hold. Because we relied somewhat on the testimony of witness Hoffman who testified on cross-examination that the timber not removed was not merchantable for the reason that it was unprofitable for defendant to remove it, defendant asserts that we adopted his definition of merchantable timber. *He did testify however, as pointed out in our opinion, that all*

*timber that had a commercial value in 1939 had been removed. In Monger v. Dimmick, 187 Or 253, 210 P2d 929, cited by defendant in his brief on petition for rehearing, we said that merchantable timber is 'all timber * * * that had * * * a commercial value in that locality * * *.'*" (emphasis supplied)

and at page 59:

"It is next argued that on the authority of *Monger v. Dimmick*, supra, defendant was not limited to the timber that was merchantable in 1939. In that case we quoted from *Adams v. Hazen*, 123 Va 304, 96 SE 741. It has never been the law in Oregon that merchantable timber is that timber which has commercial value 'during the life of the contract.' "

See also *Doherty et ux v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566 (1957) at pages 424-425, where the foregoing language from *Hughes v. Heppner Lumber Co.* was expressly quoted with approval.

Therefore, in the instant case, the definition "merchantable timber" appearing in the contract of sale, must be defined as "timber which had a commercial value" on May 4, 1942.

We will demonstrate that the only evidence in this case is that the second growth timber *on appellant's property* was not merchantable on that date.

III

All the evidence in this case shows that the second growth timber on appellant's property was not merchantable on May 4, 1942. Appellee was a trespasser when it cut the second growth and is liable for treble damages.

Prior to the execution of the May 4, 1942, contract, under which only "merchantable" timber was conveyed (Ex. 1), appellee's predecessor had a cruise of the property made by a man named Hooker (R. 274). Hooker reported there were "about five million feet" of timber (R. 275). (The notes and records of the cruiser could not be produced, since they had been lost (R. 261).) Thereafter, and following some negotiations, the contract was signed. Mr. Davidson, appellee's witness, who negotiated on its predecessor's behalf, *testified that he was not negotiating for the second growth timber.*

"Q. [by Mr. Biggs]: Yes. Was there any discussion about the second growth at that time, Mr. Davidson?

"A. If there was, I don't remember." (R. 275)

The seller, Warlick, agreed with this. He testified:

"Q. [by Mr. Dezendorf]: As a matter of fact, Mr. Davidson told you that he wasn't interested in anything but old growth, didn't he?

"A. The first time when we first talked about it, yes." (R. 237)

It is abundantly clear from the record in this case that both Davidson and Warlick knew the difference between buying "merchantable timber" and buying all of the timber on a piece of property. As a matter of fact, on August 10, 1945, Warlick sold Davidson a parcel of timber near the property involved in this case. (Ex. 30 B). In that contract, Davidson was given a period of twenty years within which to remove the timber and the conveyance sold "all of the standing and downed timber, poles and piling now on the hereinafter described land, *and any timber, poles and piling which shall grow or mature during the term of this contract * * **" (emphasis supplied)

This conclusively demonstrates that the parties did not intend to convey anything but "merchantable timber" when the contract in this case (Ex. 1) was executed. When they wanted to convey more, they knew how to do it, and did it.

Old growth timber is mature timber, sometimes called "yellow fir" (R. 164), which has always been valuable. Second growth timber is fir timber between 40 and 110 years of age (R. 163), which is of limited utility and was not used extensively in 1942 (R. 166-167). As a matter of fact, as late as 1940 *accessible* second growth timber, near a public road (R. 335), sold for \$1.20 to \$1.25 per thousand (R. 332). In 1953, when

appellee started cutting the second growth (3,125,000 board feet were cut by appellee in and after 1953 [R. 53, 59]), the second growth timber on appellant's property was worth \$19.00 per thousand, in 1954 \$24.00 per thousand, and in 1955 \$25.00-\$30.00 per thousand (R. 54). This certainly explains why appellee cut the timber, but constitutes no excuse to it. Concerning the great change in timber values during these same years, the Supreme Court of Oregon said, in *Doherty v. Harris Pine Mills, Inc.*, 211 Or 378, 315 P2d 566 (1957), (page 401):

“* * * We take judicial notice of the fact that market conditions had greatly changed between 1943 and the bringing of this action in 1955.”

On May 4, 1942, appellant's land was virtually inaccessible. This was admitted by counsel for appellee in his opening statement where he said (R. 81):

“They negotiated for some little time. Mr. Davidson wasn't ready to go in there yet to do the logging, didn't know when he would be able to get in there, because it was then not served by any logging roads or ways adequate for the purpose of taking out timber.”

See also proposed finding XV (R. 31), prepared and tendered by appellee's counsel, which says, in part:

“The Seaver tract in 1942 was inaccessible for immediate logging in that it was located in a rugged and rough area into which no logging roads had been constructed. * * *”

See also finding XV adopted by the court (R. 56), which contains this identical language.

Although it was 4 or 5 air miles from the community of Mapleton, because of the rugged terrain, a roundabout route of about 20 miles over almost impassable roads had to be traversed to reach the property (R. 105). Mr. Warlick used “an old model Buick with big high wheels” to reach the place (R. 105).

The expert witnesses, based on all the facts, testified, *without contradiction*, that this second growth timber was, in fact, not merchantable on the date of the contract.

Witness Herbert R. Jones, a forest engineer, testified (R. 145):

“Q. [By Mr. Dezendorf]: Mr. Jones, in answering my following questions will you please accept this definition of merchantable timber: Merchantable timber is that timber which has commercial value, taking into account its size, quality, location, accessibility, demand and market conditions?”

* * * * *

“Q. [By Mr. Dezendorf]: Mr. Jones, having that definition of merchantable timber in mind, do

you have an opinion as to what old-growth and second-growth fir and hemlock timber, if any, standing on the Seaver tract involved on May 4, 1942, was merchantable? And the answer should be either Yes or No.

“A. Yes.

“Q. What is your opinion in that regard?

“A. Well, my opinion is that in 1942 that the only merchantable timber would be the old-growth timber.”

Jones made a cruise of the property after all of the timber had been removed and based upon the records of appellee and information furnished by appellant, he had determined when what timber had been cut. He testified (R. 155):

“Q. (By Mr. Dezendorf): Now, Mr. Jones, bearing in mind, again, the definition of merchantable timber which I gave you immediately prior to the last question regarding merchantable timber, do you have an opinion as to how much merchantable old-growth and second-growth fir and hemlock timber was standing on the property on June 24, 1950, which was merchantable as of May 4, 1942?

“A. I can't give you the exact figure, but as to the old-growth in Section 31 I think it was around seven or eight hundred thousand. But I can't remember exactly.

“Q. Was there any other merchantable timber on the property on June 24, 1950, which was merchantable as of May 4, 1942, other than that that you have just mentioned?

"A. No; nothing that was—based on 1942 merchantability it was not merchantable.

"Q. I take it, then, that using the same merchantability test that it would be your judgment that everything that was removed from the property after June 24, 1950, except the old-growth was not merchantable on May 4, 1942; is that correct?

"A. That's correct."

Witness Fred Buss had had extensive experience in logging (R. 448-449). Mr. Buss testified:

"Q. [By Mr. Hoffman]: Now, Mr. Buss, I want to ask you this and listen, please. Will you please accept this definition I am going to read to you as the definition of merchantable timber in this case? Then you can give us your opinion. Merchantable timber is that timber on a particular date which I will mention which has a commercial value, taking into account its size, quality, its location, accessibility, demand and market conditions. Now, using that as your definition of merchantable timber, do you have an opinion as to whether or not this second-growth timber on the Seaver property on May, 1942, was merchantable?

* * * * *

"Q. (By Mr. Hoffman): Do you have an opinion?

"A. I have.

"Q. What is your opinion?

"A. Wasn't merchantable.

"Q. Was not merchantable?

"A. Not under them conditions."

Mr. Buss also testified (R. 446):

“Q. I will rephrase the question. The question is, did there occur a change in that area over these various years as to what you could log, what you could utilize?

“A. That’s right.

“Q. What was that change?

“A. Well, when we started logging second-growth we just didn’t log it.

“Q. Why not?

“A. Well, there was no profit in it.

“Q. Could you get rid of it?

“A. Oh, you could give it away.”

Appellee produced absolutely no evidence that the second growth timber on appellant’s property was merchantable in May of 1942. Each of its witnesses testified that second growth timber was used to some extent in 1942 and that some salable products were made from second growth timber at that time (R. 252, 296, 325, 342, 356). However, on cross-examination it developed that the timber which was being utilized was easily accessible and close to a *public* road (R. 334-335). As a general rule in 1942, second growth logging was avoided (R. 347).

The first sale of second growth timber by the United States Forest Service occurred in 1943 (R. 166). The

first tract purchased by Weyerhaeuser Timber Company, one of the largest operators in the area, occurred in 1944 (R. 166).

Appellee and its predecessor set up a depletion account for the timber for bookkeeping and tax purposes on the basis of the Hooker cruise (Exs. 18 A, 18 B).

In 1949 appellee's predecessor commenced logging operations on the property. Between 1949 and 1953 it removed the greater part of the "old growth" timber (5,880,000 board feet, leaving only 850,000 [R. 53, 59]), and a comparatively small amount of second growth (1,031,000 board feet out of a total of 4,156,000 [R. 53, 59]). After most of the old growth was removed agents of appellee's predecessor filed affidavits with the County Assessor of Lane County, swearing that all timber had been removed from this property (Ex. 4) (Under the Oregon Statutes [ORS 308.309] the filing of such affidavits removed the timber from the tax rolls). Under the contract appellee's predecessor was to pay all taxes on the timber.

The fact that appellee knew it did not own the second growth timber graphically appears from the stipulated findings concerning when the timber was removed from the property.

All the timber on the property was removed between 1949 and 1956, as follows (R. 53):

"Description	M Board Feet
Old growth Douglas fir.....	6,730
Second growth Douglas fir.....	4,156 "

After January 1, 1953, the following volume was removed (R. 59):

"Species	M Board Feet
Old growth fir.....	850
Second growth fir.....	3,125 "

It is therefore clear that before 1953 nearly all of the old growth was removed. Then in and after 1953 most of the second growth was removed.

The rise in values of second growth timber during that time explains why appellee cut it. It was stipulated that the stumpage values for the timber on appellant's property for the years involved were as follows (R. 54):

"Description	1950	1951	1952	1953	1954	1955
	*	*	*	*	*	
Second growth Douglas fir	5	9	14	19	24	25-30"

There is absolutely no evidence that this inaccessible second growth timber was merchantable in May of 1942. All of the evidence is to the contrary, including

the conduct of appellee's predecessor and appellee regarding the timber.

The trial court ignored and refused to recognize the undisputed evidence and the clear and unmistakable Oregon law. Consequently, it must be reversed and directed to enter judgment in favor of appellant for three times the value of all timber which was removed from appellant's property after January 1, 1953.

IV

When appellee's predecessor passed over the second growth on the first cutting and swore to and filed with the County Assessor the timber removal affidavits it thereby abandoned all timber then remaining on the property.

The majority of the timber removal affidavits were filed and sworn to by witness Frank W. McPherson, the logging superintendent of appellee's predecessor. After considerable interrogation, it was developed that he was the man with authority to file them (R. 398):

"Q. [By Mr. Dezendorf]: In 1950, as I understand it, you were the logging superintendent for Siuslaw; is that correct, Mr. McPherson?

"A. That is correct.

"Q. So that you had charge of the logging operations that were conducted, is that correct?

"A. That's right.

“Q. Did you consider it a part of your duties to file the timber affidavits at that time, after the logging had been completed?

“A. Yes.”

It conclusively appears that there was no doubt in McPherson's mind as to the facts when he made out the affidavits saying that all timber had been removed from this property.

Exhibit 4 contains exact copies of all papers in the file of the Lane County Assessor, relating to appellant's property. On *January 4, 1951*, the County Assessor wrote a letter to Mr. McPherson asking for a clarification of some of the information contained in the timber removal affidavits which had already been filed. McPherson replied: *“I do not understand your request as all timber has been removed from the reported lands * * *. The state law requires that we leave seed, trees, etc. on all timber lands which we do but we do not consider this as merchantable timber after the tract is logged.”*

This certainly belies appellee's position and the trial court's findings.

As pointed out in the Argument under Point III immediately above, these affidavits were filed between 1949 and 1951, after substantially all of the old growth

timber (all but 850,000 board feet) was removed from the property. This constitutes conclusive evidence that appellee's predecessor abandoned the second growth timber which remained in 1950.

The consequences of such action have been clearly announced by the Oregon Supreme Court, but the trial judge refused to apply the Oregon law as established by the Oregon Supreme Court in this case.

A case directly in point holding that the filing of timber removal affidavits constitutes abandonment of the timber then remaining is *Hughes v. Heppner Lumber Co.*, 205 Or 11, 283 P2d 142, 286 P2d 126. In this case defendant's predecessor purchased "all pine and merchantable fir timber" located on certain land in eastern Oregon in the year 1939. Between 1939 and 1948 defendant logged on the property and then did nothing until 1951, when it indicated an intention to resume logging operations. The plaintiff thereupon brought suit to quiet title to his land, contending that all of the timber which passed under the 1939 grant had been removed. It appeared that by 1948 defendant's agents had filed timber removal affidavits as to all of the property. With respect to the effect of these affidavits, the Supreme Court of Oregon said, at page 18:

"* * * The defendant does not dispute the making of the affidavits but attempts to evade their eviden-

tiary value by claiming that they were misled by the reports of the loggers.”

and at page 19:

“It is clear to us from a close scrutiny of the record that when defendant’s officers and employees signed the affidavits they knew what they were doing.”

In response to a petition for rehearing, the Supreme Court of Oregon wrote another opinion, commenting on the effect of the timber removal affidavits. It said, at page 58:

“It will be remembered that defendant was paying taxes on the timber and in order to remove its obligation the affidavits were executed. Because the officers and directors of the defendant company testified that they were misled when they signed the affidavits does not necessarily establish that fact. The record itself, in our opinion, belies their testimony. Four affidavits were filed with the assessor by P. W. Mahoney, attorney for and an original incorporator of the defendant company. He was its director and became its secretary in 1942. As to the foundation for his affidavits, we have his testimony:

“ ‘Q What you know about whether the timber came off or not is from reports to you by employees, is that right?

“A By employees and independent gypo contractors.’

“Orville Smith, vice-president and general manager of the company, executed one affidavit. He testified that he had done logging himself and that he was through this property any number of times between 1939 and 1951. The other affidavit was made by Allen L. Piper, forester of the company, who executed his affidavit after the defendant admittedly had examined the property.

“To give credence to their testimony we would have to find defendant’s employees and contractors guilty of fraud and deceit. In addition there would have been another fraud perpetrated on the county in depriving it of its taxes. We are inclined to believe that the testimony of these officers was prompted by a desire to profit because of the skyrocketing of timber prices some four years after it ceased operations. Their memories were obviously faulty.”

Precisely the same situation exists in the instant case. Even between 1950 and 1953 the value of the second growth timber on appellant’s property increased from \$5.00 per thousand to \$19.00 per thousand. It is clear that in 1949 and 1950, when the affidavits were filed, appellee’s predecessor intended to abandon the property and did not intend to go back and log the second growth. However, after the price of the second growth had appreciated over four times, it then appeared profitable for appellee to go in and cut the timber and it did so.

The Supreme Court of Oregon has held in no uncertain terms that private parties will not be allowed to take one position against the sovereign to evade taxes and then be permitted to testify in a civil action that the facts stated in papers filed with the sovereign were not true. In *Kergil v. Central Oregon Fir Supply Company*, 213 Or 186, 323 P2d 947 (1958), plaintiff sued defendant for the alleged balance due as rental for certain motor vehicles he had leased to defendant. Defendant attempted to show that the written leases of the motor vehicles were a mere sham to avoid paying the federal transportation tax, and that, in fact, plaintiff had already been paid in full for the use of the trucks in accordance with an oral agreement between the parties. The Supreme Court held that defendant could not make this showing because a party cannot defend himself with the claim he was actually defrauding a third person, especially the sovereign. The court pointed out that some courts will permit such proof and rejected the rule, saying, at page 189:

“The difficulty with this view is that it overlooks the moral aspects of the situation. It permits the law to be used to lend its aid to those who would mislead or defraud third parties without providing any restraining penalty upon their immoral actions.”

Here we have appellee's predecessor filing the timber removal affidavits with the County Assessor of Lane County, Oregon, admittedly to relieve itself of the obligation to pay taxes on the timber, and then its successor comes into court and claims that timber did remain on the property. Under Oregon law, this cannot be done.

As a matter of law, the filing of the affidavits constituted an abandonment of any timber remaining on the property at the time the affidavits were filed. For this reason alone, the trial court must be reversed.

V

Under the law of Oregon, the cutting of the second growth timber was willful and without right and, consequently, appellant is entitled to recover treble damages for the cutting and removal of it.

The Oregon statutes relating to damages for the wrongful removal of trees are ORS 105.810, which says:

“Except as provided in ORS 477.310 [not applicable], whenever any person, without lawful authority, wilfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, * * * in an action by such person, * * * against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In

any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant wilfully, intentionally and without plaintiff's consent."

and ORS 105.815, which says:

"When double damages are awarded for trespass. If, upon the trial of an action included in ORS 105.810, it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, or that the tree or timber was taken from uninclosed woodland for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall be given for double damages."

In this case, it is clear from appellee's conduct that its removal of the second growth timber was wilful and intentional, and there is no evidence that it was casual or involuntary or that it had any probable cause to believe that it owned the timber. Its predecessor had, in fact, already filed the removal affidavits and had removed substantially all of the old growth which it bought. Its conduct prior to 1950 clearly indicates its own belief that it did not own the second growth.

The double damage statute, ORS 105.815, was construed in the early case of *Loewenberg v. Rosenthal*, 18 Or 178, 23 P 601 (1899) (at that time it provided for only single damages). In that case, the Supreme Court said, at pages 186-188:

“* * * If said section 338 of the Code stood alone, the court would be called upon to construe it, and it might, in that case, adopt the construction contended for by the counsel, but we are spared that labor, as said section 339, as will be seen, points out the circumstances under which no more than single damages can be recovered. The legislature, by the latter section, has given a construction to the former one—has prescribed the cases in which such trespasser shall be liable for single damages only, and leaves him in all other cases liable to treble damages as prescribed in the former section; and if the courts were to attempt to make other exceptions in favor of the trespasser than those specified in said latter section, it would be an encroachment upon legislative functions. Hence the finding of the jury that the appellants had probable cause to believe, and did believe, when they carried off the wood from the land in question, that the owners of the land had authorized them to take and carry it away, was wholly immaterial and irrelevant. Their having taken and carried away the wood without lawful authority, and converted it to their own use, was not a casual or involuntary trespass, but a deliberate act upon their part, and any belief they might entertain regarding their right to do so could not avail them as a defense against a recovery of punitive damages, unless they had probable cause to believe that they were taking it from their own land, or that of the person in whose service or by whose direction the act was done, or unless they took the

wood under the other circumstances, and for the purposes mentioned in said section 339. The statute declares the circumstances under which the punitive liability attaches, and those which will exempt a party from it, and the courts have no discretion but to administer its provisions.

“The finding of the jury, under the third special finding, brings the case within said section 338, and none of the other findings take it out of the provisions of that section. The statute was enacted for a good and wise purpose; it was intended to prevent parties from recklessly going upon the lands of others, and cutting and carrying away their wood and timber. It is liable, like all laws, by reason of their universality, to work a hardship in particular cases, but generally it will, no doubt, operate as a wholesome regulation. The appellants in this case very likely think that they ought not to be required to pay anything more for the wood and timber taken and carried away by them than its actual value, as they had probable cause to believe, and did believe, when they carried it away, that the owners of the land had authorized them to do so. They could, however, have easily ascertained whether or not such was the real fact by consulting such owners, and if they had done so before engaging in the affair they would have avoided the difficulty in which they have become involved. A party should not, under such circumstances, rely upon what some other person informs him regarding such a matter. He should go to the owner of the property, and have his information verified, before he begins taking and carrying it away. I think respondents were entitled to have their damages for taking and carrying away the wood and timber in question trebled. * * *

In *Longview Fiber Co. v. Johnston*, 193 Or 385, 238 P2d 722 (1951), the court said, at pages 399 and 400:

“Finally, defendant argues that, in an action for trespass upon real property, when the plaintiff contends that the physical evidence of the original location of a section corner upon which the fact and extent of the trespass depend has been lost, and attempts to determine and reestablish the location of such corner by the testimony of his own employees upon the theory of proportional measurement rather than by the reestablishment of the original corner and line, the court may not find the defendant guilty of trespass, if, prior to the relocation of such line, he did not cut timber beyond a line claimed by him to be the original section line, of which line plaintiff had knowledge, and concerning which there was no dispute, since, until such new line was established by law, there could be no trespass over it.

“The argument is rather involved, but, in any event, it does not appear to be in point. There was no evidence in the case that, prior to the trespass, defendant had claimed any particular line to be the original section line, or that plaintiff ever had notice of any such claim. Moreover, as we have stated, there was no evidence that defendant made any effort to locate the boundary line prior to the trespass. The suggestion that until a new line was established by law the defendant could not be guilty of trespass over such line cannot be accepted. There was at all times a boundary line between the lands of plaintiff and those of defendant. Its exact location may not have been susceptible of determination from existing physical evidences at the time of the trespass, but at all times the location could have been reestablished by survey.

“It was defendant’s duty to have determined in advance the exact location of his boundary line. There is no evidence that he made any attempt whatever to do so until after his cutting of timber upon plaintiff’s land had been called in question. This fact tends rather to aggravate the trespass than to excuse it.”

Witness Frank W. McPherson, logging superintendent of appellee’s predecessor, and appellee testified that although he was familiar with the terms of the May 4, 1942 contract, appellee and its predecessor treated appellant’s property exactly as if they owned the fee title to the land and logged it without regard to the merchantability qualification of the contract. McPherson testified (R. 412):

“Q. Now, as I understand your statement on direct, Mr. McPherson, you said that you conducted the logging operations on the Seaver property just the same as were conducted on other properties which was owned in fee by Siuslaw or U. S. Plywood. Did I understand you correctly?

“A. That would be about right, yes. Every tract has its own peculiarities.

“Q. But I mean with respect to the selection of trees, and things of that kind, you logged it just the same as you did property that you owned in fee?

“A. Within reason, yes.

“Q. You intended to take whatever trees were actually taken from the Seaver tract, is that correct?

“A. I would say yes.”

and (R. 414):

“Q. All right. I take it, Mr. McPherson, that when the second-growth timber was taken from the Seaver land in the period 1951 to 1955 that you intended to take it and knew what you were taking; is that correct?

“A. That is correct.

“Q. When, if ever, Mr. McPherson, did you examine the Warlick-Siuslaw May 4, 1942, contract?

“A. Well, we had it in our records there all the time.

“Q. Were you familiar with it all the time?

“A. During the time of this operation, speaking about '49-'50, I'd say Yes.

“Q. So that you were familiar with the terms of the May 4, 1942, contract during the time that logging operations were performed on the Seaver tract?

“A. Yes.

“Q. And it was right in your file?

“A. In our file.

“Q. And even with that you conducted your logging operations on the Seaver property just as if you owned the fee, is that right?

“A. That is right.”

The evidence in this case will support no other conclusion but that appellee knew that it did not own the second growth timber on appellant's property. Its predecessor had already abandoned the second growth.

When it then went upon the property and removed the substantial majority of the second growth after 1950, it was acting wilfully and is liable for treble damages.

VI

There is no evidence in this case that appellant consented to appellee's removal of the second growth timber from his property.

Appellant testified (R. 107):

“Q. (By Mr. Dezendorf): Mr. Seaver, when did you first find out that you had a claim against the defendant or its predecessor for taking timber from this property to which they were not entitled?

“A. That was in early spring of 1956.

“Q. How did you find it out then?

“A. I went to Mr. Hoffman and talked to him.

“Q. He is the Mr. Hoffman who is your attorney in this case?

“A. My attorney, yes.”

and (R. 132-133):

“Q. (By Mr. Biggs): The lawsuit that Mr. Hoffman was authorized to start for you, this lawsuit, this trespass case, was based upon your claim and his advice to you, wasn't it, that the U. S. Plywood was trespassing because they had not completed their logging operations within five years after they started; isn't that correct?

“A. Yes.

“Q. He didn’t, then, advise you and you didn’t request advice or didn’t assume that you had any right for damages against U. S. Plywood because of the removal of any non-merchantable trees, did you?”

“Mr. Dezendorf: If the Court please, I would have to object to that. This case started out as a trespass case and it still is a trespass case.

“The Court: I don’t know what the relevancy would be, anyway. Suppose this man didn’t know all of his right? Does it mean that he can’t assert them now?”

“Mr. Biggs: No, your Honor; not at all. I just simply want to show that until the amended complaint was filed here nobody who had any connection with this tract of timber from—”

The elements necessary to establish an estoppel are clearly stated by the Oregon Supreme Court in *Bennett v. City of Salem et al*, 192 Or 531, 235 P2d 772, at page 541:

“To constitute an equitable estoppel, or estoppel by conduct, (1) there must be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it. (Cites)”

The undisputed testimony above set out discloses that appellant did not learn until he contacted his at-

torney in the spring of 1956 that appellee and its predecessor were only entitled to remove such timber as was merchantable on May 4, 1942.

Thus, it was not until after all the timber in question had been removed that appellant was advised of his rights.

There is no evidence in the record, and none can be produced, to show that appellee or its predecessor changed its position in any way in reliance upon any action or inaction of appellant which took place after appellant first learned that appellee and its predecessor had taken timber from his land to which they were not entitled. On the contrary, all of the evidence shows that appellee knew at all times that it did not own the second growth timber on appellant's property and that it had no right to remove it. It in no way relied on appellant's action or inaction in pursuing the conduct it chose. Therefore, it cannot excuse itself from its clear trespass by a belated claim that it was misled by appellant.

VII

As a matter of law, evidence of the alleged "actual" intent of appellant's and appellee's predecessors when they negotiated the 1942 contract was inadmissible.

Under the law of Oregon the words "merchantable timber" are not ambiguous. They have a well-understood meaning of "timber which has a commercial

value” considering all the facts and surrounding circumstances. See *Hughes v. Heppner Lumber Co.*, supra, and *Doherty v. Harris Pine Mills, Inc.*, supra. As a matter of fact, in the *Doherty* case the contract involved was held ambiguous because of several inconsistent terms contained in it. It did use the words “merchantable timber.” Concerning this part of the contract, the Supreme Court said:

“Considered alone this paragraph [merchantable timber] would appear to be clear and unambiguous * * *”

Since the contract is not ambiguous, parol evidence is not admissible to vary its terms.

The Oregon parol evidence rule appears in a statute, ORS 41.740, which says:

“When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be, between the parties and their representatives or successors in interest, no evidence of the terms of the agreement, other than the contents of the writing, except where a mistake or imperfection of the writing is put in issue by the pleadings or where the validity of the agreement is the fact in dispute. However this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in ORS 42.220, or to explain an ambiguity, intrinsic or extrinsic, or to establish illegality or fraud. * * *”

In the case of *Elliott et ux v. Tallmadge*, 207 Or 428, 297 P2d 310 (1956), there was a contest between a purchaser of real property at a mortgage foreclosure sale and a trustee in bankruptcy of the mortgagor for title to some refrigerators and ranges in an apartment house. Both the mortgagor and the mortgagee testified that they intended to include this equipment in the real property mortgage and thus, the foreclosure purchaser claimed it. The Supreme Court of Oregon held as a matter of law that the property was personalty and belonged to the trustee in bankruptcy. After discussing another case, the court said, at page 431:

“We can see no distinction in the two cases, with the one exception that in the present case both the mortgagee and mortgagor testified that when the mortgage was given it was the intention of the parties that the ranges and refrigerators were to become a part of the realty. This evidence was not admissible, but even if it were, it would not be controlling * * *.”

In *Taylor et ux v. Wells et ux*, 188 Or 648, 217 P2d 236 (1950), it was held that an option could not be shown to have been meant to be the right to buy if the sellers decided to sell. The court held the option absolute as it read. The lower court was reversed for failing to enforce the agreement and admitting parol evidence to explain it. The Supreme Court of Oregon said, at page 659:

“The rule which prohibits the modification [sic] of a written contract by parol evidence (§ 2-214, O.C.L.A.) ‘is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties.’ (Cites) Evidence properly falling within the inhibition of the rule does not become admissible merely because it has probative value or is not objected to. (Cites)

“It is said in 32 C.J.S., Evidence, § 863, that there is a conflict of authority as to whether parol evidence which is inadmissible because it varies or contradicts [sic] a writing, but which has been admitted without objection, must on the one hand, be considered and given its due effect, or on the other hand, must be disregarded, in the trial court.’ The weight of authority supports the rule that such evidence should be disregarded. Especially is this true in those jurisdictions where it is held that the parol evidence rule is one of substantive law and not one of evidence merely. (Cites)

“In our opinion all the parol evidence which tended in any way to vary or contradict the written option should be disregarded and the written option should be specifically enforced.”

In *Webster et ux v. Harris*, 189 Or 671, 222 P2d 644 (1950), plaintiff and defendant entered into a written agreement whereby defendant agreed to sell plaintiff 4,000,000 feet of logs. Plaintiff sued, claiming the parties had orally agreed that the logs should come from a certain tract of land and that defendant had breached the agreement. The Supreme Court held as a matter of law that the oral agreement or modification of the written contract could not be proved, saying:

“The written contract appearing on its face to be complete, and no issue having been made respecting its validity, or that it embodied a mistake or imperfection, it is to be considered as containing all of the terms of the agreement, and no evidence thereof was admissible between the parties other than the writing itself. (Cites) The parol evidence rule embodied in the code * * * is one of substantive law. (Cites) * * * Plaintiff’s case was based upon the pleaded oral modification of the integrated written contract, and, such modification being inadmissible as a matter of substantive law, the complaint failed to state facts sufficient to constitute a cause of action, * * *.”

In this case, as has been demonstrated above, under the law of Oregon “merchantable timber” is a well-understood and unambiguous term. Therefore, parol evidence is not admissible to show that the parties actually meant those words to include all timber on the property, whether it had a commercial value at the time or not. The trial court should not have admitted this evidence, and this evidence can afford no basis for the trial court’s conclusion that the second growth timber passed under the 1942 contract.

CONCLUSION

In 1942 appellee’s predecessor purchased all “merchantable” timber on appellant’s property. Between 1949 and 1951 it cut and removed substantially all of

the old growth timber on the property which, under the only evidence in this case, constituted all merchantable timber on the property as of May 4, 1942. Thereafter, appellee returned to the property and cut and removed over 3,000,000 feet of second growth timber. The only possible conclusion to be drawn from the record in this case was that appellee acted wrongfully when it cut and removed second growth timber in and after 1953. The trial court must be reversed and directed to enter a Judgment for appellant.

Respectfully submitted,

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APPENDIX OF EXHIBITS

EXHIBIT	IDENTIFIED	OFFERED AND RECEIVED	RE- JECTED
1	108-109	108-109	
2	108	108	
3	109	109	
3	109	109	
4	109	109	
5	110	109-110	
6	108	108	
7	110, 147, 148	153	
8	110, 153-154	111	
9	111	111, 155	
12-A-12-O	112	113, 478-484	
14	113	491	
15	113	491	
16A-16D	113	491	
18A-18B	114	114	
20A, 20B	115, 468	115	
30A	248	248	
30B	288	434, 435	
31	115	115	
32A	386	386	
32B	386, 434	386	
33	236	236	
51		177, 182	

EXHIBIT	IDENTIFIED	OFFERED AND RECEIVED	RE- JECTED
52	184	177, 182	
53	268	177, 182	
54		177, 182	
56		177, 182	
59		178, 182	
60		178, 182	
63		178, 182	
64		178	
65	135	135	
66		178, 182	
67	427	178, 182	
68	126, 127	127	
69	126	129	
70		179	
71		179	
72	125	126	
73	125	126	
74		179	
75		179	Stricken 187
76	467	489	
77	187	187	
78	225	226	